No. 88-1905

In The

Supreme Court of the United States

October Term, 1988

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

Petitioners,

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. Is the First Amendment to the United States Constitution implicated by a state law that compels all attorneys to belong and pay annual dues to a state bar association (a public corporation) where state law also grants the bar broad discretion to engage in political and ideological activities, unrelated to regulation of the legal profession, with which its members may disagree?

2. Does a state law requirement that an attorney belong and pay dues to a state bar association violate the attorney's First Amendment rights of speech and association where the compelled fees and association are used to promote political and ideological activities with which the attorney disagrees such as adopting resolutions in favor of ballot initiatives concerning handgun control and nuclear weapons freeze, lobbying on legislation concerning comparable worth, criminal penalties, and environmental issues, and filing briefs amicus curiae in support of an attack on the constitutionality of California's Victims' Bill of Rights Initiative and supporting prisoners arguing that California prison conditions violated their constitutional rights?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to this action.

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DECISIONS BELOW

The decision of the California Supreme Court is reported at 47 Cal. 3d 1152, 767 P.2d 1020 (1989), and is reproduced as Appendix A (App.). Page references are to the version in the appendix. The decision of the California Court of Appeal is reproduced as Appendix B.

JURISDICTION

The decision of the California Supreme Court, review of which is sought in this petition, was entered on February 23, 1989, and was filed that same day. No petition for rehearing was sought. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The California constitutional provision at issue is Article VI, Section 9. Statutory provisions at issue are the provisions of California's State Bar Act, codified at California Business and Professions Code § 6000, *et seq*. The full text of the relevant provisions of the act and the above-mentioned constitutional provisions are set out in Appendix D.

STATEMENT OF THE CASE

This is an action by 21 attorneys, licensed to practice law in California, to halt the use of their compelled fees and association for political and ideological activities with which they disagree.

To practice law in California courts, an individual must both belong and pay annual dues to the State Bar of California (Bar). Cal. Bus. & Prof. Code §§ 6002, 6143 (the relevant provisions of the California Business and Professions Code are reproduced in Appendix D commencing at Page D-3). Practicing law without meeting these preconditions is a criminal violation. Cal. Bus. & Prof. Code § 6126. App. at D-27. Far from limiting its activities to the regulation of the practice of law, petitioners established that the State Bar uses the compelled dues moneys and the mandatory association to promote a political and ideological agenda with which petitioners disagree. The undisputed facts presented by petitioners established the nature and scope of the Bar's political activities.

In 1982, when this action was filed, the Bar's Conference of Delegates had taken a position on ballot measures concerning a nuclear weapons freeze and handgun control. App. at E-12. The Bar also filed briefs amicus curiae attacking the constitutionality of the Victims' Bill of Rights Initiative and the conditions in California prisons. App. at E-11. The Bar lobbied the California Legislature on numerous issues taking positions on bills concerning such diverse topics as comparable worth, drug paraphernalia, criminal penalties, workfare, legislative veto, inmate labor, vehicle smog inspections, armor piercing

bullets, campaign contributions, and employment of foreign nationals, to name but a few. App. at E-8-E-11.

Petitioners' complaint sought a declaration that the Bar's advancement of a political and ideological agenda with compelled dues and association violated petitioners' First Amendment rights. App. at E-5. Petitioners also sought an injunction against all political and ideological activity by the Bar since the Bar was not a "voluntary" association. App. at E-6.[1]

The trial court granted the Bar's motion for summary judgment ruling that the Bar was a governmental agency and thus restricted in its activities only by the authorizing legislation.. App. at C-2. The California Court of Appeal for the Third Appellate District reversed that judgment. That court ruled that the Bar had a dual character, resembling both a governmental agency when fulfilling its regulatory functions, and resembling a labor association when acting pursuant to statutory authority to promote the "science of jurisprudence" or advance the improvement of the "administration of justice." App. at B-23-B-24. The Court of Appeal defined jurisprudence as " '[t]he philosophy of law, or the science which treats of the principles of positive law and legal relations' " and

[1] Petitioners' complaint also contained a claim relating to the Bar's participation in an election campaign and a request that the individual members of the Board of Governors be required personally to reimburse the Bar treasury for any misspent funds. Both of these claims were finally adjudicated by the California Supreme Court on state law grounds and are thus not raised in this petition.

defined "administration of justice" as relating to the "adjudication or adjustment of rights and duties in a legal system . . . how a legal system is managed and conducted." App. at B-38 n.13. The court ruled that when the Bar was acting pursuant to such goals that it was fulfilling a compelling governmental interest sufficient to overcome petitioners' First Amendment rights. App. at B-3. If petitioners could show, however, that even acting pursuant to those interests the Bar's activity caused some First Amendment injury beyond the compelled association, the Court of Appeal held that the Bar would have to demonstrate some additional compelling governmental interest that would justify the further injury. *Id.* The court also held that political and ideological activity that was not germane to those limited interests could not be financed with petitioners' compelled dues payments. *Id.*

The California Supreme Court reversed the decision of the Court of Appeal and rejected petitioners' First Amendment challenge to the State Bar's expenditure of mandatory dues revenues. The court held that the Bar was a governmental agency and as such was not bound by the precedent of this Court concerning compelled dues payments in the labor union context. *E.g., Abood v. Detroit Board of Education,* 431 U.S. 209 (1977); *cf. Lathrop v. Donohue,* 367 U.S. 820 (1961). App. at A-3. Under the California high court's ruling, the only restriction on State Bar activities was that the challenged activity be within the Bar's statutory authority to promote the "science of jurisprudence" or improve the "administration of justice." App. at A-24. The court refused to define these terms, but instead noted:

> "In the context of lobbying and amicus curiae activities, this language should be read broadly. Laws are the business of lawyers. . . .Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal." *Id.*

The California Supreme Court then ruled:

> "Accordingly, we conclude the bar may use dues to finance all activities germane to its statutory purpose, a phrase which we construe broadly to permit the bar to comment generally upon proposed legislation or pending litigation." App. at A-3.

Finally, the court held that the Bar's authority to act for improvement of "the science of jurisprudence" and the "administration of justice" was so broad as to encompass all of the challenged activity. In the court's view, the entire question was one of statutory interpretation:

> "The Legislature is well aware of the bar's activities, and that the bar's authority for those activities derives from [California Business and Professions Code] section 6031 [authorizing the bar to "advance the science of jurisprudence" and "improve the administration of justice"]. Knowing these matters, the Legislature has annually approved bar dues, some of which go to support lobbying and amicus curiae briefs, and has amended section 6031 to prohibit one specific activity – the rating of appellate judges. We infer that the Legislature essentially approves a broad construction of the statute which would permit the bar's existing activities." App. at A-25.

The court thus found all of the challenged lobbying, amicus activity, and conference resolutions to be within the statutory power of the Bar.

The federal issues on which review is sought in this Court were first raised in the complaint (App. at E-5), and

were subsequently raised at each stage of the proceedings (App. at F-9). The decision of the court below, review of which is sought, directly concerns the federal issue raised in this petition – the First Amendment to the United States Constitution. App. at A-10.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 17(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way in conflict with another state court of last resort, or of a Federal Court of Appeals. Rule 17(c) includes as a ground for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. All three of these grounds for review are present in this case.

I

THE DECISION IS IN CONFLICT WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS

In rejecting the analysis employed by this Court in the *Abood* decision, the California Supreme Court created a direct conflict between itself and at least three United States Circuit Courts of Appeals.[2] The clearest example of

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[2] Petitioners are informed that a petition for writ of certiorari to review the decision of the Seventh Circuit Court of Appeals

(Continued on following page)

this conflict is found in the case of *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986). In that case, the Eleventh Circuit cited with approval the California Court of Appeal decision in this case that was ultimately reversed by the California Supreme Court. 798 F.2d at 1569.

In *Gibson*, the plaintiff alleged that lobbying activities by the Florida Bar violated his rights to freedom of speech and association under the First Amendment. After reviewing the decisions of this Court in *Lathrop* and *Abood*, the Eleventh Circuit concluded that the analysis employed in *Abood* must also be used in determining whether First Amendment rights are violated when a state bar association finances ideological activities with compulsory dues assessments. *Id.* In line with this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Eleventh Circuit ruled that the challenged activities of the Florida Bar must be tested pursuant to the compelling state interest/least drastic means test. *Gibson*, 798 F.2d at 1569. The court remanded the case to the District Court for further factual development and noted that the bar would bear the burden of proving that its expenditures were constitutionally justified. *Id.*

Another decision in conflict with the ruling of the California Supreme Court is *Romany v. Colegio de Abogados*

(Continued from previous page)

in *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1989), is also currently pending before this Court. The issues raised in that case, while not precisely the same as those in the instant action, also concern the appropriate mode of First Amendment analysis in considering challenges to compulsory state bar associations.

de Puerto Rico, 742 F.2d 32 (1st Cir. 1984). In *Romany*, the First Circuit reviewed the decision of the District Court for the District of Puerto Rico that found unconstitutional the statutes providing for the creation of the Colegio (the integrated bar association of Puerto Rico) and its financing through compelled dues and the sale of "forensic stamps" which must be affixed to the initial document that any lawyer files in a Puerto Rican court. *Id.* at 34. The court held that the District Court should have abstained until the Puerto Rico Supreme Court had a chance to offer a remedy. *Id.* at 40. The court did, however, rely on this Court's decision in *Abood* to describe the First Amendment rights at stake in the controversy. The court also noted that because of the importance of those rights, the dissident members of the bar were entitled to interim relief pending a decision of the Puerto Rico court. *Id.* at 44.[3]

The most recent federal appeals court decision to apply the *Abood* analysis to a challenge to an integrated bar association is *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3d Cir. 1988). In that case, the Third Circuit considered a broad ranging attack on various aspects of the Virgin Islands Bar Association, including that bar's "taking a public position regarding a potential United States attorney." *Id.* at 170. To analyze this claim, the Third Circuit turned to this Court's decision in *Abood*. *Id.*

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[3] After allowing the Puerto Rico courts an opportunity to provide a remedy, the District Court again found that the Colegio's ideological activity was so pervasive as to make compelled membership in the organization unconstitutional. *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988).

The Court ruled that an integrated bar could expend compelled dues assessments to express opinions so long as the causes sought to be advanced were "germane to the purpose underlying its integration, i.e., the furtherance of the administration of justice." *Id.*

The California decision also conflicts with an earlier Federal District Court decision that was not appealed. In *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982), the District Court applied this Court's decision in *Abood* to strike down a lobbying program instituted by the New Mexico State Bar. *Id.* at 461. The court in *Arrow* rejected the New Mexico bar's proffered interest of informing the state legislature of the views of the bar on issues "which may reasonably be expected to promote the administration of justice or improvement of the legal system." *Id.* at 462. Such a standard, according to the court, would have created an "all-encompassing exception to the rule of *Abood*." *Id.*

The decision of the California Supreme Court in this case presents a clear conflict with these decisions of the United States Circuit Courts of Appeals. Although the decisions cited above may vary as to their conclusion on the application of the law to specific facts, they are in complete agreement as to the law to be applied. Each of the decisions cited above looked to this Court's line of decisions beginning with *Abood* to determine the nature of the rights at stake and the analysis for adjudicating claims regarding those rights. The California Supreme Court departs from this line of cases by refusing even to recognize the existence of a First Amendment question. The conflict presented between the California Supreme Court and the circuits is direct and concrete. This Court should grant certiorari to settle this conflict.

II

THE DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER STATE SUPREME COURTS

In addition to the federal cases cited above, a number of other state supreme courts have also reviewed this issue and come to a conclusion in direct conflict with that of the California Supreme Court. In *Petition of Chapman*, 509 A.2d 753 (N.H. 1986), the New Hampshire Supreme Court considered a challenge to lobbying activity of the New Hampshire State Bar Association. The court there recognized:

> "The constitutional claim that the petitioner raises is a serious one. It involves the delicate balance between the free speech rights of an individual and those of an organization of which he is required to be a member. As such, he has only limited input into legislative positions taken by the Association. Nonetheless, whatever his level of influence within the organization, the most extreme form of protest, withdrawal, is not open to him." *Id.* at 757-58 (citation omitted).

After tracing this Court's decisions in *Abood* and *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984), the New Hampshire court concluded that it could best protect the First Amendment rights of bar members through its own continuing supervision over bar activities:

> "[W]e have a greater freedom and a greater responsibility in the case before us because of our authority to regulate the legal profession. In interpreting language in the Association's constitution describing its purposes, we can craft a standard which will at once

recognize the negative first amendment rights of dissenting Association members and achieve consistency with the Association's core responsibilities." *Chapman*, 509 A.2d at 758.

The New Hampshire court thus concluded that the First Amendment to the United States Constitution was implicated by mandatory membership and compelled dues requirements of an integrated bar association.

The Florida Supreme Court has also reviewed this issue. Although the Eleventh Circuit in *Gibson* disputed the end result of the Florida court's analysis, the Florida court did recognize the application of the First Amendment to the activities of the Florida Bar. In *The Florida Bar*, 439 So. 2d 213 (Fla. 1983), the Florida Supreme Court considered and rejected a petition to amend the Integration Rule of the Florida Bar to prohibit the bar from engaging in political activity. The Florida court recognized that compelling membership in and dues payments to the state bar had an impact on bar members' First Amendment rights. *Id.* at 213. To overcome that impact, the Florida court noted that the state needed to establish a compelling state interest. *Id.* The court specifically cited this Court's decision in *Abood* in ruling that the challenged activity must be "germane" to the compelling interest. *Id.*

The most complex and confusing decision on a First Amendment challenge to a state bar's activities was issued by the Supreme Court of Michigan. In two separate decisions, that court split two-two-three. Though unable to agree on a conclusion, a solid majority of the court did agree that the First Amendment was implicated

by mandatory membership in and compelled dues payments to an integrated bar association. In its ultimate decision in *Falk v. State Bar of Michigan*, 342 N.W.2d 504 (Mich. 1983), the court denied the plaintiff's motion to be relieved from paying for certain bar association activities, but the court did appoint a committee to review the activities of the bar and to report back to the court with recommendations. *Id.* at 504.

Three members of the Michigan court, relying on this Court's decision in *Abood*, decided:

> " 'The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected.' " *Falk*, 342 N.W.2d at 515-16 (opinion of Ryan, J.).

Two other members of the Michigan court, also relying on this Court's decision in *Abood*, agreed that compulsory association and dues payments do implicate First Amendment interests. *Id.* at 508-09 (opinion of Boyle, J.). They disagreed with the plurality, however, over application of what they termed "strict scrutiny." *Id.* at 509. Instead, they thought that the appropriate analysis was to balance "the severity of the injury to the individual interest against the magnitude of the government interest sought to be served." *Id.* The remaining two justices thought that the action should be dismissed on procedural grounds. *Id.* at 514-15 (opinion of Kavanagh, J.). Those two justices did not, however, indicate any dispute

with the concept that there was a First Amendment issue present in the action.

The California Supreme Court acknowledged these state and federal decisions but attempted to distinguish them:

> "None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation. Consequently, while we are uncertain whether the courts have correctly described the bar associations at issue in the cited cases we remain confident that the California State Bar is best described as analogous to a governmental agency." App. at A-19-20 (footnotes omitted).

Certainly it cannot seriously be argued that state supreme courts that were the genesis of the integrated bar associations erred in describing the nature of those associations in the cited cases. Similarly, there exists no distinction of constitutional significance as to which coequal branch of state government establishes the integrated bar or provides for the continued collection of compulsory dues. It simply makes no difference whether the state bar is formed by a legislature or a court. In either case the First Amendment analysis must be the same. There are no distinctions between the California State Bar and the integrated bar associations analyzed in the decisions cited above. The decision of the California Supreme Court stands in direct conflict with those decisions and this Court should grant review to resolve that conflict.

III

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. At a minimum, the outcome of this case impacts on the entire mandatory membership of the State Bar of California – a group that now numbers in excess of 110,000. *The California Regulatory Law Reporter,* Vol. 9, No. 1 at 107 (Winter 1989). Further, at least one-half of the states have chosen to regulate the legal profession through an integrated bar association. *In re Integration of the Bar,* 93 N.W.2d 601, 603 (Wis. 1958); *see Petition of Moody,* 524 P.2d 1261, 1266 (Alaska 1974). Another measure of the impact of this case is the amount of litigation that has already taken place on this issue. In addition to the cases cited above, this issue has been before the courts in *Reynolds v. State Bar of Montana,* 660 P.2d 581 (Mont. 1983); *Report of the Committee to Review the State Bar,* 334 N.W.2d 544 (Wis. 1983); *On Petition to Amend Rule 2 of the Rules Governing the Bar,* 431 A.2d 521 (D.C. 1981); and *Levine v. Heffernan* (petition for writ of certiorari pending).

Perhaps the most significant indicator of the importance of the issues presented in this case is the fact that this Court has, on a prior occasion, indicated a desire to review these legal questions. In *Lathrop v. Donohue,* this Court reviewed a challenge to the requirement of compelled membership in and dues payments to the State Bar of Wisconsin. Far from rejecting the agency fee analogy as did the California Supreme Court, a plurality of this Court specifically looked to its earlier decisions on the agency fee issue in order to determine the similar issues

presented by an integrated bar association: "In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in Railway Employes' Dept. v. Hanson." *Lathrop*, 367 U.S. at 842 (opinion of Brennan, J.). The plurality did not believe that the case was ripe for a determination of the constitutionality of specific bar expenditures, and thus the issue has been left undecided to this day. Certainly, there would have been no ripeness problem had this Court decided, as did the California court below, that there were no First Amendment implications to political and ideological activity by an integrated bar association.

Another possible indication of this Court's views on this issue is found in the *Abood* decision. In analyzing whether compelled dues payments to a teachers union for political or ideological activities violated a dissenting nonmember's First Amendment rights, this Court noted the similarity between that claim and the claim presented in *Lathrop*. *Abood*, 431 U.S. at 233 n.29. Because no majority could be mustered in *Lathrop* on the constitutional issue, this Court in *Abood* noted "Lathrop does not provide a clear holding to guide us in adjudicating the constitutional questions here presented." *Id.*

While neither of these cases presents a sufficiently definite position of this Court to support a finding that the California Supreme Court decision conflicts with a determination of this Court, both *Lathrop* and *Abood* indicate that this Court believes the issue presented here to be important enough to justify a grant of review. Both cases also acknowledge that the issue of whether an integrated bar association violates the First Amendment by spending compelled dues on political and ideological

activities has yet to be decided. This case presents the Court with the opportunity to make such a decision. Thus, the Court should grant review to settle an important question of federal constitutional law impacting a significant segment of the population.

CONCLUSION

The conflict presented by the decision of the California Supreme Court is clear and unmistakable. The California court has rejected the decisions of three United States Circuit Courts of Appeals and three other state supreme courts. Departing from a long line of decisions issued by this Court, the California Supreme Court ruled that there were *no* First Amendment implications to a state law requirement of membership in and compelled dues payments to a state bar association. In so holding, the California court upheld the expenditure of compelled dues for a virtually unlimited array of political and ideological activity. So long as the state Legislature continues to approve (or at least not object to) Bar expenditures, there can be no claim that the expenditures are inappropriate.

Review by this Court is necessary to resolve the conflict created by the California Supreme Court's decision in this case. Review is also necessary so that this Court can finally resolve the important question of law left unanswered nearly three decades ago in *Lathrop*. Petitioners respectfully urge this Court to grant this petition

for writ of certiorari and reverse the judgment of the California Supreme Court.

DATED: May, 1989.

Respectfully submitted,

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APPENDIX VOLUME I

APPENDIX A

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EDDIE KELLER et al., Plaintiffs and Appellants, v. THE STATE BAR OF CALIFORNIA et al., Defendants and Respondents.	S.F.25050 (Ct. of Appeal 3 Civ. No. 24124) (Super. Ct. No. 307168) (Filed FEB 23 1989)

This suit attacks the use of dues collected by the State Bar of California to finance lobbying, amicus curiae briefs and other activities, including election campaign activities, politically or ideologically objectionable to plaintiffs. Upon analysis of the constitutional status and legislative structure of the State Bar, we conclude that the State Bar may use dues to finance any activity, except election campaigning, which is germane to its statutory mission to promote "the improvement of the administration of justice." (Bus. & Prof. Code, § 6031, subd. (a)[1].)

Acting pursuant to its statutory authority, the State Bar for many years has lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education

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[1] Unless otherwise indicated, all California statutory citations are to the Business and Professions Code.

programs. In 1982 the State Bar publicized the inaugural speech by its new president, Anthony Murray, in which he addressed the confirmation of appellate justices in the impending election. The State Bar subsequently disseminated material on that subject to local bar associations and other organizations.

All of these activities were financed primarily from membership dues, as are all bar activities except the bar examination. The State Bar levies membership dues pursuant to statutory authority (§ 6140) subject to a maximum limit set annually by the Legislature. Every attorney engaged in active practice in California is required to be a member of the bar (§§ 6125-6126) and to pay the dues assessed; a refusal to pay results in the suspension of membership (§ 6143), which deprives the attorney of the right to practice law in California (§ 6225).

Plaintiffs contend that the activities in question constitute the advancement of political and ideological causes, and cannot constitutionally be financed from mandatory dues. This is an issue of first impression in this state. Courts of some other jurisdictions have limited the use of bar dues, but there is no consensus concerning those limits.

When we set out to analyze the issue, we are confronted immediately with two competing paradigms. The State Bar argues that we should view it as a government agency, which may use revenues from any source for any purpose within the scope of its authority. Plaintiffs, on the other hand, argue that we should view the bar as a labor union or private association whose right to use dues money is restricted by constitutional principles.

We believe the governmental agency paradigm more closely fits the case of the California State Bar. Accordingly, we conclude the bar may use dues to finance all activities germane to its statutory purpose, a phrase which we construe broadly to permit the bar to comment generally upon proposed legislation or pending litigation. By analogy to governmental agencies, however, the bar may not engage in election campaigns; thus certain of the activities in connection with the 1982 election exceeded its statutory power.

I. *Proceedings In This Action.*

Plaintiffs, 21 members of the State Bar, filed suit against the bar and its Board of Governors. Their complaint alleged that "[t]he State Bar of California, by and through its Board of Governors, has expended and will continue to expend substantial portions of the revenues derived from . . . mandatory dues payments to advance political and ideological causes, including, but not limited to:

"a. lobbying the California State Legislature on various matters . . . ;

"b. submitting briefs amicus curiae in various cases . . . ;

"c. financing meetings of the Conference of Delegates at which political and ideological causes are advanced . . . ;

"d. publicizing the political and ideological speeches of its president, Anthony M. Murray . . . ;

"e. financing a so-called 'public information' project designed to disseminate to the general public a particular ideology regarding judicial retention elections. . . ."

Plaintiffs then alleged that they do not subscribe to many of the political and ideological causes promoted by the bar, and object to the use of mandatory dues to advance any of the political and ideological views of the Board of Governors or the conference of delegates. They sought a declaration that defendants have violated their constitutional rights, an injunction restraining defendants from using bar dues or the name of the State Bar to advance political and ideological causes or beliefs, and an injunction compelling defendants to reimburse the bar for all funds expended for political and ideological purposes since September 12, 1982.

Plaintiffs attached a partial list of the bills which the bar has lobbied for or against, of the cases in which it has appeared as amicus curiae, and of resolutions adopted by the conference of delegates. They also attached a copy of Anthony Murray's inaugural address when he became president of the bar on September 12, 1982, a press release describing that address, and a later press release dated October 8. (Although the complaint referred to "speeches," the September 12 speech is apparently the only one at issue.) Finally, plaintiffs attached a copy of an educational packet entitled "The Case for an Independent Judiciary" distributed by the bar in October of 1982. The packet included a copy of Murray's inaugural address, a resolution of the Board of Governors, a sample speech, fact sheets on crime and conviction rates, judicial retention elections, and judicial performance, and suggestions for speech fora and media coverage.

Defendants answered, admitting that they have used dues to finance all of the described activities, but maintaining that such expenditures did not violate plaintiffs' rights.[2] Defendants then moved for summary judgment or adjudication of issues. In support, they submitted declarations which described the bar's legislative and amicus curiae program and asserted that the bar usually acted only in matters which affect the bar itself, the attorney-client relationship, or the administration of justice. In lobbying or filing amicus curiae briefs the bar's representatives purport to act only on behalf of the State Bar, and not to represent the views of each of its members. Plaintiffs filed a cross-motion for summary judgment, but submitted no declarations.

The trial court granted summary judgment for defendants, finding that the State Bar was a governmental agency authorized to do the acts in question. The court further found that the plaintiffs had failed to show that the individual defendants acted without due care or in bad faith.

The Court of Appeal reversed. The majority opinion by Justice Sparks divided State Bar activities into two categories. The first, regulatory activities, included the testing and admission of bar applicants and the disciplining of members. These activities, the Court of Appeal said, were akin to those of a governmental agency. The bar's administration-of-justice function – a function which included all the activities here challenged – it

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[2] Defendant Phyllis Hix answered separately, asserting only the defense of failure to state a cause of action. She is not involved in this appeal.

found akin to the actions of a labor union. Such actions, it held, could be financed from mandatory dues only if the particular action in question served a state interest important enough to overcome the interference with dissenters' First Amendment rights.[3] Each lobbying activity, it said, and each amicus curiae brief, would have to be examined, with the State Bar bearing the burden to justify its action.

The Court of Appeal further held that the Murray speech and educational packet constituted election campaigning unauthorized by statute. It further found that the Board of Governors' approval of such unauthorized expenditures may subject its members to personal liability, and raised a triable issue concerning their good faith and exercise of due care. We granted the defendants' petition for review.

II. *Structure And Function Of The State Bar.*[4]

Although the parties submitted much documentation in support of and in opposition to the respective motions, there is no real factual dispute about the State Bar and its activities. As we recently recounted, "[i]n 1927, the Legislature adopted the State Bar Act (Bus. & Prof. Code,

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[3] Justice Puglia, concurring, maintained that the bar must prove that financing such activities from mandatory dues served a compelling state interest that cannot be achieved by less restrictive means.

[4] The discussion in this section is adapted from the Court of Appeal opinion of Justice Sparks.

§ 6000 et seq.) establishing 'what is known as an "integrated" bar, i.e., an organization of members of the legal profession of the state with a large measure of self-government, performing such functions as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice.' (1 Witkin, Cal. Procedure (1970 ed.) Attorneys, § 157, p. 168.)" (Saleeby v. State Bar (1985) 39 Cal.3d 547, 557.)[5] Thus, the State Bar is authorized to establish an examining committee to "examine all applicants for admission to practice law" and thereafter to "certify to the Supreme Court for admission those applicants who fulfill the requirements. . . ." (§ 6046, subds. (a), (c).) Under the board's auspices, local administrative committees may investigate complaints about the conduct of members and may thereafter forward reports and recommendations to the board for action. (§ 6043, subds. (a), (c).) After a hearing, the board "has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproval, public

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[5] "An integrated bar is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments." (Note, First Amendment Proscriptions on the Intergrated Bar: *Lathrop v. Donohue Re-Examined* (1980) 22 Ariz. L. Rev. 939, 941, fn. omitted.) It is to be distinguished from a voluntary bar association in which membership is optional with the lawyers of the state. (See Winters, Bar Association Organization and Activities (1954) p. 1.)

or private, with such recommendation." (§ 6078.) "In those two areas, the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of [the Supreme Court], which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. In the area of admission to practice, an applicant is admitted only by order of the Supreme Court which, upon certification by the bar's examining committee that the applicant fulfills the admission requirements, 'may admit such applicant as an attorney at law in all the courts of this State. . . .' " (*Saleeby, supra,* at p. 557, citations omitted.) In addition to those duties, the State Bar enforces the law relating to the unlawful practice of law and illegal solicitation (§§ 6030, 6125-6131, 6150-6154), administers an arbitration system for fee disputes (§§ 6200-6206), maintains a client security fund (§ 6140.5) and engages in other similar matters relating to the legal profession.

In addition to these powers, the board is empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice. . . ." (§ 6031, subd. (a).)[6] This has been called the "laudable general purpose of the [State Bar] act." (Herron v. The State Bar (1931) 212 Cal. 196, 199.) The bar's general counsel has described this provision as "the springboard for State Bar activities."

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[6] The board is also authorized by that subdivision to aid in "all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public."

(Hearing on Use of Mandatory State Bar Dues, Assem. Com. on Judiciary (Sept. 17, 1980) letter of Herbert M. Rosenthal, p. 111.) Some of the bar's actions undertaken pursuant to this section have been statutorily delineated; most have not. For example, the State Bar is mandated by statute to cooperate with and give assistance to the Commission on Judicial Performance (Gov. Code, § 68725), to assist the Law Revision Commission (Gov. Code, § 8287), and to evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record. (Gov. Code, § 12011.5.) In aid of all of its powers, the State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes." (§ 6001, subd. (g).)

To carry out its functions, the State Bar is governed by a Board of Governors of 22 members, 16 of whom are members of the State Bar and 6 of whom are nonattorneys appointed by the Governor of the state with approval of the Senate. (§§ 6010, 6011, 6013.5.) Fifteen of the attorney members of the board are elected by the members of the State Bar from geographical areas established by the Legislature, and one member is elected by the board of directors of the California Young Lawyers Association. (§§ 6012, 6013, 6013.4.) The board elects the officers of the State Bar. (§§ 6021-6024.) The State Bar has established a conference of delegates, which consists of representatives of voluntary local and special bar associations. The conference meets once a year to consider proposals, many of which are intended for legislative action. The board has also established committees or sections open to members of the bar interested in particular areas of the law and which advise the board in those areas.

The bar employs attorneys who represent it in disciplinary actions and other litigation, including the present case. On direction of the Board of Governors, the attorneys file briefs amicus curiae in litigation affecting the bar or its members. The bar also employs lobbyists to present the position of the board to the Legislature and state agencies.

III. *The State Bar, For The Purpose Of Expenditure Of Dues, Is Analogous To A Governmental Agency.*

The issue we face today came before the United States Supreme Court in Lathrop v. Donohue (1961) 367 U.S. 820. Plaintiffs in that case challenged the constitutionality of the Wisconsin integrated bar. Relying on cases upholding the constitutionality of legislation authorizing the union shop (International Association of Machinists v. Street (1961) 367 U.S. 740; Railway Employees' Dept. v. Hanson (1956) 351 U.S. 225), all justices agreed that compulsory membership in the bar was constitutional. (See Levine v. Heffernon (7th Cir. 1988) ___ F.2d ___.) Justice Brennan, writing for four justices, declined to reach questions concerning the use of mandatory dues because the plaintiffs had not objected to any specific expenditure. The remaining five justices agreed that the issue of use of dues was properly before the court, but disagreed on the result. Justice Harlan, joined by Justice Frankfurter, treated the bar association as analogous to a governmental agency and dues as analogous to license fees, and found no constitutional infirmity in the use of dues for authorized purposes. (See *Lathrop, supra,* 367 U.S. at pp. 864-865.) The member, he points out, is not required affirmatively to profess or

assent to any belief, and the bar, in its lobbying activities, did not claim to present the views of all of its members. (See *id.* at pp. 860-861.) Justice Whittaker asserted briefly that practicing law was a special privilege, which could be conditioned on payment of bar dues. Justices Douglas and Black dissented, referring to their opinions in International Association of Machinists v. Street, *supra,* 367 U.S. 740, where they said that the use of union dues to finance political activities violated the members' First Amendment rights. Thus as pointed out in a subsequent case, all *Lathrop* decided was that the constitutional issues concerning use of bar dues should be decided; it did not decide those issues. (Abood v. Detroit Board of Education (1977) 431 U.S. 209, 233 fn. 29.)

Consequently the treatment of bar dues remains an unsettled question. We recognize certain similarities between the bar and a labor union which would support imposing upon the bar those restrictions which limit union expenditures. The bar is an association composed of members of a particular profession. It is governed by a board, the majority of whom are elected by the members. It holds annual meetings. Although much of its activity is done to promote the public interest, it also regularly acts on behalf of the special interest of its members.

The California Constitution, statutes, and judicial decisions, however, appear to envision the bar as a governmental agency. The State Bar Act of 1927, codified in sections 6000-6087, provides in section 6001 that "[t]he State Bar of California is a public corporation." This declaration attained constitutional status with the enactment in 1966 of article VI, section 9 of the state Constitution, which asserts that "[t]he State Bar of California is a

public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record."

What is a "public corporation"? When the State Bar Act was enacted in 1927, this term was defined by a statute, since repealed: a public corporation is one "formed or organized for the government of a portion of the state." (Former Civ. Code, § 284.) Construing that statute, a 1917 decision said that "[P]ublic corporations . . . are those corporations formed for political and governmental purposes and vested with political and governmental powers." (Bettencourt v. Industrial Acc. Com. (1917) 175 Cal. 559, 561.)

In State Bar of California v. Superior Court (1929) 207 Cal. 323, it was contended that the State Bar could not be a public corporation because it was not created to govern "a portion of the state," and that the State Bar Act was thus an unconstitutional attempt to create a private corporation.[7] The court responded that the statute defining a public corporation could not limit the Legislature from enacting subsequent statutes creating public corporations for purposes other than the government of a portion of the state. It added that the Legislature has

[7] The parties and the court appeared to assume that "a portion of the state" meant a geographical portion. One amicus curiae in the present case, however, contends that "portion" can be defined in other ways, and that the State Bar does govern a portion of the state, namely the attorneys of California in the practice of their profession.

frequently created public corporations which did not have the function of governing a portion of the state, citing examples of reclamation districts, levee districts, and irrigation districts.[8]

It was further argued in State Bar v. Superior Court, *supra*, 207 Cal. 323 that the State Bar must be considered a private corporation in view of its membership, functions, purpose, and its independence from public regulation and control. The court responded that the regulation of the practice of law is within the police power of the state – a close issue in 1929, but not today – and referred to legislative and judicial regulation as sufficient to classify the bar as a public corporation.

This decision does not answer the question whether a public corporation is necessarily a governmental agency. But it is significant that all other public corporations in California – water districts, school districts, reclamation districts, etc. – are clearly considered governmental entities. Conversely, no labor union or professional association is classified as a public corporation.

Apart from its denomination as a public corporation, other aspects of the bar show its governmental nature. The Board of Governors includes six public members

[8] These are districts which perform services for landowners within a geographic area. Although their structures vary (many having been created by special statute), generally they are governed by an elected board. The electors may consist of all residents, or of landowners, and the latter may vote in proportion to the value of their holdings. Such districts generally have the power to levy taxes.

School districts represent another type of nonmunicipal public corporation.

appointed by the Governor, who are not members of the bar. (§ 6013.5.) The presence of "consumer representatives" on state regulatory boards is a common phenomenon, but no law permits the Governor to appoint nonmembers as officers of a labor union or private association. Section 6008 declares that "[a]ll property of the State Bar is hereby declared to be held for essential public and governmental purposes" and is exempt from taxation. Section 6026.5 requires public meetings; a similar requirement applies to governmental regulatory boards but not to unions or private associations. Section 6001, subdivision (g) states that "[n]o law of this State restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies . . . shall be applicable to the State Bar, unless the Legislature expressly so declares" – an unnecessary enactment unless laws governing the exercise of powers of state public bodies or state agencies would otherwise apply to the bar. In Chronicle Pub. Co. v. Superior Court (1960) 54 Cal.2d 548 we said that this last provision demonstrates "[t]hat the Legislature considered the State Bar as at least akin to a state public body or agency" (p. 565), and held that officers of the bar could claim the confidential communication privilege given public officers under former Code of Civil Procedure section 1881.[9] A later decision, Engel v.

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[9] Former Code of Civil Procedure section 1881, subdivision 5, provided that "[a] public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." This statute has been superseded by Evidence Code sections 1040-1042.

McClosky (1979) 92 Cal.App.3d 870, applied the tort claims act (Gov. Code, § 810 et seq.) to the State Bar.[10]

A recent amendment to section 6031 further indicates that the Legislature views the bar as a governmental agency. Subdivision (b), added by the amendment, provides that "the board [of governors] shall not conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice [of an appellate court] . . . without prior review and statutory authorization by the Legislature." If the State Bar is considered a private association, the constitutionality of this statute is suspect. It is a content-defined prohibition of a particular form of political speech by a named organization, imposed, apparently, because the Legislature objected to bar attempts to influence the voters. It would be difficult to justify a prohibition on political speech by a private association, especially one enacted because the speaker is thought too knowledgeable and influential with the voters. If the bar is thought of as a governmental agency, on the other hand, section 6031, subdivision (b), merely defines the scope of authority of the agency, and raises no constitutional question.

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[10] The tort claims act applies to "public entities," defined as including "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." The Law Revision Commission Comment states that "[t]his definition is intended to include every kind of independent political or governmental entity in the state."

As we noted earlier, the Court of Appeal divided the state bar's function into two parts. It held that in regulating the admission of members to the bar, and disciplining current members, the bar performed a governmental function, but in all other activities it was analogous to a private association. We reject this holding on two grounds. The first is simply that the reason we view the bar as analogous to a governmental agency is not only that it performs a governmental function, but that the state Constitution, statutes, and court decisions treat it as a governmental agency. Those enactments and decisions do not differentiate according to the specific activity performed by the bar. Thus the bar is a public corporation, whether it is disciplining members or filing amicus curiae briefs; it is exempt from taxation and immune from tort liability both when examining applicants for admission and when lobbying the Legislature. Its stature under the California Constitution, its structure, and its government are the same for all its functions. We conclude that however classified, it must be regarded as a single entity.

Second, the Court of Appeal's dichotomy, viewing lobbying and amicus curiae activity as that of a private association, would frustrate the legislative purpose underlying the bar's authority to promote the administration of justice. Under the Court of Appeal's view, whenever the bar proposed to advise the Legislature or the courts of its views on a matter, it would first have to engage in the three-step analysis set out in Ellis v. Railway Clerks (1984) 466 U.S. 435. The bar must first determine whether the activity is germane to the purpose for which the bar has compulsory membership. Next, if the activity is germane, it must decide whether it inflicts an

infringement of the dissenters' First Amendment rights beyond that inflicted by compulsory membership alone. Finally, if there is an infringement of First Amendment rights, it must determine whether there is a state interest sufficient to justify that infringement.[11]

Such a procedure would be an extraordinary burden. Hundreds of bills come before each legislative session; cases affecting the administration of justice arise frequently. Bar action, to be effective, must take place before the legislative session ends or the case is submitted. The bar has neither time nor money to undertake a bill-by-bill, case-by-case *Ellis* analysis, nor can it accept the risk

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[11] Serious conceptual difficulties arise in applying this three-step analysis to the State Bar. The first step asks whether an activity is germane to the purpose of compulsory membership. We know the functions of the State Bar – they are set out in statute – but the concurring and dissenting opinion impliedly suggests that the purpose of compulsory membership may be a more limited one, the delivery of quality legal services and the improvement of the legal profession. (*Post*, p. ___ [typed opn. at p. 26].) It does not explain this distinction.

The second step inquires whether the activity imposes a burden on First Amendment rights additional to that imposed by compulsory membership. The cases, however, do not elucidate which uses of dues impose burdens subsumed in compulsory membership, and which impose additional burdens.

The last step examines whether there is a state interest sufficient to justify the additional burden on objectors' rights. We have no guidance on what interest will meet this criterion: the Michigan Supreme Court, which considered this matter twice, was unable to reach agreement. (Falk v. State Bar of Michigan (1981) 305 N.W.2d 201 [Falk I]; Falk v. State Bar of Michigan (1983) 342 N.W.2d 504 [Falk II], cert. denied (1984) 469 U.S. 925.)

of litigation every time it decides to lobby a bill or brief a case.[12] Thus the likely result of the Court of Appeal's approach would be to deter the bar from conducting *any* lobbying or filing *any* amicus curiae briefs. If those activities promote the administration of justice by providing the Legislature and the courts with expert legal assistance, as we believe, an approach which would deter all lobbying and amicus curiae activity would frustrate the state interest underlying the establishment of an integrated bar.

Furthermore, the one area where the Legislature has indicated displeasure with the bar's activity concerns election campaigning. Yet if the bar is viewed as a private association, it would have a constitutional right to participate fully in political campaigns. (See Abood v. Detroit Board of Education, *supra*, (1977) 431 U.S. 209, 235-236; cf. Buckley v. Valeo (1976) 424 U.S. 1.) No explicit authorization would be necessary; any prohibition on such activity, such as section 6031, subdivision (b), would be unconstitutional.[13] Again, such a result would seem inconsistent with legislative intent.

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[12] The situation is not analogous to a labor union, which serves a much more limited function and constituency. The function of the bar is not limited to promoting the self-interest of its members, but extends to promoting the improved administration of justice. Thus the bar is properly concerned with legislation other than just that which affect the earnings and working conditions of attorneys.

[13] The bar as a private association would be subject to limitations on what election activities it could finance from dues. (Cf. Ellis v. Railway Clerks, *supra*, 466 U.S. 435.) But actions which do not require expenditure of money, such as the endorsement of candidates, could not be challenged.

We recognize that most of the cases from other jurisdictions which have addressed the subject of integrated bar dues have applied the labor union analogy to the bar. (Gibson v. The Florida Bar (11th Cir. 1986) 798 F.2d 1564; Schneider v. Colegio de Abogados de Puerto Rico (D.P.R. 1983) 565 F.Supp. 963, revd in part in Romany v. Colegio de Abogados de P.R. (lst Cir. 1984) 742 F.2d 32, on remand Schneider v. Colegio de Abogados de Puerto Rico (D.P.R. 1988) ___ F.Supp. ___; Arrow v. Dow (D.N.M. 1982) 544 F. Supp. 458 [New Mexico Bar]; The Florida bar (Fla. 1983) 439 So.2d 213; *Falk I*, *supra*, 305 N.W.2d 201; *Falk II*, *supra*, 342 N.W.2d 504; Reynolds v. State Bar of Montana (1983) 660 P.2d 581.)[14] None of the bar associations involved in those cases, however, rest upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation. Consequently, while we are uncertain whether the courts have correctly described the

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[14] The one exception is Sams v. Olah (1969) 225 Ga. 497. The Georgia Supreme Court rejected a contention that the integrated bar of Georgia was unconstitutional because it spent funds for political purposes. Declaring that the bar was not a labor union (p. 506), the court concluded that the only issue was whether the fees were spent for the purposes for which the bar was created. (P. 507.) "The promotion of political issues and candidates is not within the purposes of the State Bar. . . . The fostering of legislation and the promotion of ideologies may, or may not, be consonant with the purposes of the State Bar, according to the nature of the legislation and the ideologies." (P. 508.)

bar associations at issue in the cited cases[15] we remain confident that the California State Bar is best described as analogous to a governmental agency.[16]

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[15] Only one of these cases gives any reason for applying the labor union paradigm to an integrated bar instead of viewing it as a governmental agency. Gibson v. The Florida Bar, *supra*, 789 F.2d 1564, 1568, quoted Justice Powell's concurring opinion in Abood v. Detroit Board of Education, *supra*, 431 U.S. 209, 259, footnote 13, where he said that " 'the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.' " (789 F.2d at p. 1568, quoting Abood v. Detroit Board of Education, *supra* 431 U.S. 209, 259, fn. 13.)

We find the argument unpersuasive. A city government is representative of a segment of the state's population which, by reason of geography, shares common interests; a bar association is representative of a segment which, by reason of career, shares common interests. Each, we think, is a governmental agency, which to fulfill its statutory function must be able to spend money on controversial matters.

[16] In Lathrop v. Donohue, *supra*, 367 U.S. 820, 864-865, Justice Harlan, supporting the use of dues to finance lobbying by the Wisconsin bar, wrote: "I had supposed it beyond doubt that a state legislature could set up a staff or commission to recommend changes in the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel. . . . It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer. . . . In this circumstance, wherein lies the unconstitutionality of what Wisconsin has done? Does the Constitution forbid the payment of some part of the Constitutional

(Continued on following page)

IV. *The Consequences Of Viewing The State Bar As A Governmental Agency.*

If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority.

Two Court of Appeal decisions illustrate the point. In Erzinger v. Regents of University of California (1982) 137 Cal.App.3d 389, certiorari denied, 462 U.S. 1133, students at the University of California objected that the compulsory student registration fees included a fee for health services which included abortions. The Court of Appeal, noting that the Board of Regents is a governmental agency, treated the fee as equivalent to a tax, and held that one could not refuse to pay a tax because of ideological or religious objections to the use of the money.

(Continued from previous page)

license fee directly to the equally Constitutional state law revision commission? Or is it that such a commission cannot be chosen by a majority vote of all members of the state bar? Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things? [¶] I end as I began. It is exceedingly regrettable that such specious contentions . . . should have resulted in putting the Integrated Bar under this cloud of partial unconstitutionality."

In Miller v. California Com. on Status of Women (1984) 151 Cal.App.3d 693, appeal dismissed, 469 U.S. 806, plaintiffs attacked the commission's expenditures incurred in lobbying for the enactment of the equal rights amendment. The Legislature responded by enacting Government Code section 8246, which expressly authorized such lobbying.[17] The Court of Appeal found the statute controlling. Rejecting the claim that commission lobbying infringed the rights of dissenters, it wrote that the claim failed to distinguish between the government's addition of its own voice and its silencing of others. " 'That government must regulate expressive activity with an even hand if it regulates such activity at all does not mean that government must be ideologically "neutral." ' "(P. 700, quoting Tribe, American Constitutional Law (1978) p. 588.) Government may not compel citizens to express a particular viewpoint, nor delegate to nongovernmental entities the power to extract funds to support political and ideological activity not directly related to the entity's purpose. *Ibid.*, citing Abood v. Detroit Board of Education, *supra*, 431 U.S. 209.) " 'But none of this means that government cannot add its own voice to the many that it must tolerate, provided it does not drown out private communication.' " (*Ibid.*, quoting Tribe, *op. cit. supra*, p. 590.) "If the government . . . cannot appoint a commission to speak on the topic [of the status

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[17] Section 8246 provides in subdivision (a) that "the commission is expressly authorized to inform the Legislature of its position on any legislative proposal pending before the Legislature and to urge the introduction of legislative proposals."

of women] without implicating plaintiffs' First Amendment rights it may not address any other 'controversial' topics. If the government cannot address controversial topics it cannot govern." (P. 701.)[18]

We conclude that the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority. The concurring and dissenting opinion disputes this conclusion, arguing that even if the bar is a governmental agency its use of dues should be subject to restrictions hitherto imposed only on labor unions and other private associations. But no precedent supports the imposition of such restrictions on a governmental agency. Moreover, as we have previously explained (*ante*, p. ___ [typed opn. at p. 20]), applying the labor union test to the bar would impose upon the bar the massive burden of analyzing all proposed activities under vague and uncertain standards designed for organizations of quite different purpose and structure, and would probably discourage the bar from carrying out its statutory functions.[19]

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[18] Other cases approving lobbying by governmental agencies include Stanson v. Mott (1976) 17 Cal. 3d 206, 218; Crawford v. Imperial Irrigation Dist. (1927) 200 Cal. 318; Powell v. City & County of S.F. (1944) 62 Cal.App. 2d 291.

[19] Under the concurring and dissenting opinion, the State Bar would have the worst of both the private and the governmental worlds. It would be subject to constitutional restrictions on its use of dues, as are private associations, but would not enjoy the constitutional rights of private associations to endorse candidates and engage in political campaigns.

Having decided that the bar may use dues for any authorized purpose, we next inquire into the scope of its authority. As previously noted, section 6031, subdivision (a) authorizes the bar to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." In the context of lobbying and amicus curiae activities, this language should be read broadly. Laws are the business of lawyers. The drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal. "The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems." (*Falk I, supra,* 305 N.W. 201, 231-232 (opn. of Williams, J.) fns. omitted)[20]

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[20] The same reasoning applies to lobbying before administrative agencies, and to the filing of amicus curiae briefs. Agencies and courts, in their interpretation of laws, also benefit from the collective advice of the bar.

Thus we do not distinguish between proposed legislation of substantive character and that which aims only at procedural changes. Substantive legislation has procedural effects, as, for example, when a change in tort law affects the number of cases settled and the number going to trial. And even if the proposed bill seems at first glance to relate entirely to substantive matters unrelated to the practice of law, the advice of expert practitioners could still be crucial; an example might be a bill concerning community property which has consequences, unforeseen by its author, upon estate planning or federal tax liability.

We conclude that a bill-by-bill, case-by-case, review of bar lobbying and amicus curiae briefs is unnecessary and unworkable. We do not impose such scrutiny on lobbying and litigating by other governmental agencies. The Legislature is well aware of the bar's activities, and that the bar's authority for those activities derives from section 6031. Knowing these matters, the Legislature has annually approved bar dues, some of which go to support lobbying and amicus curiae briefs, and has amended section 6031 to prohibit one specific activity – the rating of appellate judges. We infer that the Legislature essentially approves a broad construction of the statute which would permit the bar's existing activities.

Holding a conference of delegates also falls within the bar's authority. (Cf. Ellis v. Railway Clerks, *supra,* 466 U.S. 435, 448, 455-456 (union conventions).) Plaintiffs, however, assert that some of the resolutions debated and passed by the conference fall beyond the boundary. The examples they cite, however, do not support this assertion; all but one relate to proposed changes in California

law and that one relates to federal court jurisdiction, a subject which affects the practice of law in California.

The bar's actions in connection with the 1982 election present a different issue. We have no doubt that the bar's actions related to the administration of justice. Indeed few matters bear as directly upon the administration of justice as the standards for the appointment and retention of judges. In Stanson v. Mott, *supra*, 17 Cal.3d 206, however, we set out a special rule limiting state agency participation in election campaigns. We there stated that absent "clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign." (17 Cal.3d at pp. 209-210.) Informational or education expenditures, on the other hand, require no such explicit authorization, for an agency has "implicit power to make 'reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment. . . .' " (P. 220, quoting Citizens to Protect Pub. Funds v. Board of Education (N.J. 1953) 98 A.2d 673, 676.)

We recognized that "[f]requently . . . the line between unauthorized campaign expenditures and authorized informational activities is not so clear. . . . In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." (P. 222, fn. omitted.)

The present case is one of those we anticipated in Stanson v. Mott, supra, 17 Cal.3d 206. Anthony Murray's inaugural speech was delivered about three months

before the 1982 election, and clearly referred to that election. (The speech itself, of course, cost the State Bar nothing; the issue concerns its being publicized through press release and educational materials.) Some of its language is quite strident; he denounces the "idiotic cries of . . . self-appointed vigilantes . . . [and] unscrupulous politicians." Some portions of the speech are restrained and educational in tone: he describes the history of the concept of judicial independence from the failed impeachment of Justice Samuel Chase to the present day and the role and philosophy of the bar,[21] and presents statistics concerning this court's review of criminal cases. The speech did not mention any justice by name, or urge the retention of any or all of the justices.[22] The bar's subsequent press release simply describes the speech, highlighting Murray's assertion that "the only legitimate basis for refusing to retain or for recalling a justice is a showing of incapacity or misconduct in office."

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[21] Murray asserts a proposition which counsel for the State Bar have not chosen to argue here – that it is the proper role and indeed duty of the bar to defend the judiciary from unjustified attack because judges are inhibited from election campaigning themselves. Amici curiae adopt the argument and refers us to the American Bar Association Code of Professional Responsibility, Ethical Consideration, EC 8-6, which states that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."

[22] As *Stanson, supra*, 17 Cal.3d 206, explains, it is not essential that the publication expressly exhort the voters to vote one way or another. Stanson notes:

(Continued on following page)

The educational packet, sent to local bar associations and other interested groups, contained Murray's speech, a sample speech entitled "The Case for an Independent Judiciary" (a quite restrained and philosophical exposition), sample letters to organizations which might provide a speech forum, and a sample press release. It also included fact sheets on crime and conviction rates, judicial selection and retention, and judicial performance and removal criteria. It concluded with quotations concerning

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"In 35 Ops.Cal.Atty.Gen. 112 (1960), for example, the trustees of the Madera Union High School District placed a full page advertisement in a general circulation newspaper one day before a school bond election. The advertisement did not explicitly urge voters to 'Vote Yes' on the bond issue, but stated in large letters that 'A CLASSROOM EMERGENCY EXISTS NOW AT MADERA UNION HIGH SCHOOL' and listed a number of reasons why additional funds were needed by the school district. The county counsel requested the Attorney General's opinion as to whether public funds could be used to pay for the advertisement.

"After reviewing the relevant judicial authorities, the Attorney General concluded that although the advertisement did not explicitly urge a 'Yes' vote and did disclose relevant factual information, the use of public funds to pay for the advertisement would nonetheless be improper. The opinion reasoned: 'Viewed as a whole, the advertisement cannot properly be held to be a publication primarily designed to educate the voters as to the activities carried on by or the conditions of the Schools of the district. . . . The style, tenor and timing of the advertisement placed by the board of trustees points plainly to the conclusion that the publication was designed primarily for the purpose of influencing the voters at the forthcoming school bond election.' (35 Ops. Cal.Atty.Gen. 112,114.)" (17 Cal.3d at p. 222, fn. 8.)

judicial independence from Hamilton, Madison, Jefferson, and others.[23]

The bar may properly act to promote the independence of the judiciary; such conduct falls clearly within its statutory charge to advance the science of jurisprudence and improve the administration of justice. In the present case, however, the nature and timing of the 1982 publication (see Stanson v. Mott, *supra*, 17 Cal.3d 206, 222), indicate that it is a form of prohibited election campaigning. The material was distributed approximately one month before an election in which six justices of this court came before the voters for confirmation. It is the kind of material which a state election committee distributes to local committees to aid them in the campaign. Its style and tenor is appropriate to that end; it is basically informative and factual, but without claim of impartiality, and includes such practical tools as a form letter to groups which might host a speaker. While intended to educate the reader because its authors believed an informed campaigner would be a more effective campaigner, its primary purpose, we believe, was to assist in the election campaign on behalf of the justices.

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[23] In distributing these materials, the bar acted pursuant to a unanimous resolution of the Board of Governors declaring "that it is the duty of the legal profession and all of its members to . . . [t]ake steps to maintain and promote understanding and confidence, among the citizens of this state and the nation, in the need for an independent judiciary. . . ." The resolution further declared "that the State Bar should take necessary and appropriate steps to support these principles and to aid the profession and the public in understanding them."

We conclude that in preparing and distributing this material, the State Bar exceeded its statutory authority.

In view of the absence of any prior authority in California construing section 6031, and the obvious difficulty of the issue, we cannot fairly hold the governors personally liable for the 1982 expenditures. The bar has long been concerned with promoting and defending the independence of the judiciary. It formally endorsed the initiative which established the present system of judicial retention elections in place of partisan elections.[24] It has frequently debated and proposed measures for merit selection and life tenure for judges. As we noted earlier, it is charged with an ethical obligation to defend the judiciary from unfair attack. (See fn. 22, *ante*.) Under these circumstances, we conclude as a matter of law that the Board of Governors could reasonably believe that it had the authority to take action in opposition to what it perceived to be an attack on an independent judiciary. Under Stanson v. Mott, *supra*, 17 Cal.3d 206, 226-227, such a reasonable belief precludes personal liability.

V. *Conclusion*.

In light of the structure of the California State Bar, as imposed in the state Constitution, statutes, and court

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[24] The present system was an outgrowth of an earlier proposal for reform of judicial elections in Los Angeles County. That proposal was drafted by the bar, which lobbied for passage of the constitutional amendment through the Legislature and then campaigned unsuccessfully for its approval by the voters. (See Smith, *The California Method of Selecting Judges* (1951) 3 Stan.L.Rev. 571.)

decisions, we conclude that the activities of the bar should be governed by the standards applicable to governmental agencies. Thus lobbying, amicus curiae briefs, and the annual conference of delegates can be financed through dues as presently done. The bar, however, may not engage in election campaigning; its activities in publicizing Murray's 1982 speech and distributing the educational packet violated that prohibition. In light of past uncertainty concerning the scope of the bar's authority, however, we hold that the governors are not personally liable for the unauthorized expenditures.

The judgment of the Court of Appeal is reversed, and the case remanded for further proceedings consistent with this opinion.

BROUSSARD, J.

WE CONCUR:

MOSK, J.
ARGUELLES, J.
CLINTON W. WHITE*

*Presiding Justice of the Court of Appeal, First Appellate District, Division Three, sitting under assignment by the Chairperson of the Judicial Council

COPY

EDDIE KELLER et al. v. STATE BAR OF CALIFORNIA et al.
S.F. 25050

CONCURRING AND DISSENTING OPINION BY KAUFMAN, J.

I concur in the majority's conclusions that the State Bar is precluded from engaging in election campaigning and that the bar's publication of president-elect Anthony Murray's 1982 speech and distribution of the educational package violated that prohibition. I further concur in the majority's holding that the bar governors are not personally liable for reimbursement of the unauthorized electioneering expenditures. I respectfully dissent, however, from its holding that, because of the State Bar's status as a governmental agency, its expenditure of objecting members' mandatory dues for political or ideological causes is lawful and exempt from constitutional scrutiny.

DISCUSSION

The majority opinion considers the California State Bar to be "best described as analogous to a governmental agency." If viewed as a governmental agency, the majority declares, the bar is not subject to First Amendment constraints when spending its objecting members' mandatory dues because a governmental agency may expend tax revenues to perform its statutory duties without restrictions and "the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial." (Maj. opn. at p. [typed opn. at pp. 23-24].) Therefore, the majority concludes, the bar may

properly spend funds for "all matters pertaining to the advancement of the administration of justice," (Bus. & Prof. Code, § 6130, subd. (a).), which it defines expansively as virtually anything having to do with law, except electioneering.

While it correctly characterizes the State Bar as a governmental agency, the majority opinion is incorrect in concluding that because the State Bar is a governmental agency its expenditure of objecting members' dues is exempt from First Amendment scrutiny. That error is grounded in the majority's failure to recognize the significance of a crucial fact: The California State Bar derives its funds from membership dues which all attorneys, and only attorneys, in California are required by law to pay as a condition precedent to pursuing their livelihood – the practice of law – in the state. It is this fact – compelled membership in a professional association with mandatory dues as a condition to practice the profession of law – that subjects the State Bar to the constitutional scrutiny from which most other governmental agencies may be exempt. In an unbroken line of cases, the United States Supreme Court has held that, when a state compels membership in an association as a condition precedent to earning a livelihood, the association's objecting members' First Amendment rights are infringed by its expenditure of mandatory membership dues for philosophical, political or ideological causes.

Resistance to coerced association and intolerance of government-enforced support of philosophical, religious, political or ideological causes animated the founding of our nation and the drafting of its Constitution. Thomas Jefferson wrote in 1779 "that to compel a man to furnish

contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." (Brant, James Madison: The Nationalist (1948) p. 354.) Madison warned that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases. . . ." (II Writings of James Madison (Hunt ed. 1901) p. 186.)

These principles have guided the United States Supreme Court's First Amendment jurisprudence. "If an association is compelled, the individual should not . . . be required to finance the promotion of causes with which he disagrees." (Machinists v. Street (1961) 367 U.S. 740, 776 [Douglas, J., conc.].) "[T]he First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other." (Id. at p. 791 [Black, J., dis.].) First Amendment principles "prohibit the [state] from requiring any [individual] to contribute to the support of an ideological cause he may oppose as a condition of holding a job. . . ." (Abood v. Detroit Board of Education (1977) 431 U.S. 209, 235.) Individuals can "be required to become 'members' of [an association], but those who object[] [can]not be burdened with any part of the [association's] expenditures in support of political or ideological causes." (Ellis v. Railway Clerks (1984) 466 U.S. 435, 447.) "The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of [the dissenters'] interest in not being compelled to subsidize the propagation of political or ideological views that they

oppose is clear." (Chicago Teachers Union v. Hudson (1986) 475 U.S. 292, [106 S.Ct. 1066, 1075].) Indeed, *Hudson* emphasized this point by relying on the principles expressed by Thomas Jefferson and James Madison quoted above. (Id. at p. ___, fn. 15 [106 S.Ct. at p. 1075]; see also *Abood* at pp. 234-235, fn. 31; *Street* at p. 778, fn. 4 [Douglas, J., conc.].)

The United States Supreme Court has thus steadfastly invalidated coerced association to the extent it enforces financial support of political and ideological causes to which a member objects. In a series of decisions, the court has prohibited unions from expending the mandatory dues of objecting members for such causes not sufficiently related to the governmental interests justifying coerced association. (*Ellis*, supra, 466 U.S. at p. 447.) As I explain below, these same First Amendment principles also preclude the California State Bar from spending its objecting members' mandatory dues for controversial causes not sufficiently related to the governmental interests that justify compulsory bar membership.

In this connection it is essential to keep in mind that except as to expenditures for electioneering, the principal question in this case is not whether the State Bar may lawfully make the expenditures at issue, but whether in doing so it may utilize the compulsory dues of objecting members and thereby compel those members to support causes they oppose. Simply concluding, as the majority does, that the State Bar is authorized to make the expenditures to which plaintiffs object does not resolve the constitutional question of whether plaintiffs' First Amendment rights are infringed by the expenditure of

their compulsory dues for political and ideological activities to which they object.

I. *Expenditure of Dues for Political and Ideological Activities Violates the First Amendment*

A. *Historical Origins*

In Railway Employees' v. Hanson (1956) 351 U.S. 225, the United States Supreme Court first considered a challenge to a "union shop" agreement.[1] Nonunion employees complained that such an agreement, by forcing them "into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought," violated their First Amendment rights. (Id. at p. 236.) Because the challenge was directed to the facial validity of the Railway Labor Act, the court confined its inquiry to the statute, holding that Congress, acting under its broad commerce clause powers,[2] could reasonably determine that industrial peace required all employees who benefitted from union representation to support financially "the work of the union in the realm of collective bargaining." (Id. at p. 235.) The court specifically noted, however, that

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[1] A union shop agreement is a provision in a collectively bargained agreement which requires employees, within a certain period of time after being hired, to join and maintain membership in the union. (See § 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh.)

[2] The court noted that the commerce clause Power "often has the quality of police regulations." *Hanson*, supra, 351 U.S. at p. 235.)

First Amendment problems would arise if " 'assessments' are in fact imposed for purposes not germane to collective bargaining." (Ibid.) Thus, the court indicated the possibility of a First Amendment challenge in situations where a union, under a union shop agreement, required objecting employees to support financially activities not germane to the union's collective bargaining duties. (See id. at p. 238.)

Just such a challenge was presented in Machinists v. Street, supra, 367 U.S. 740, 749. In *Street*, the plaintiff alleged that the union, which required him to pay dues under a union shop agreement, used these funds "to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed." (367 U.S. at p. 744.) The court chose, however, to avoid the constitutional question, basing its decision instead on an interpretation of the relevant statute. It held that Congress, in enacting the union shop provision (§ 2, Eleventh, of the Railway Labor Act), never intended to grant the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. (Id. at p. 768.)

B. *The Court's Consideration of Integrated Bar Associations*

In a companion case to *Street*, supra, 367 U.S. 740 (Lathrop v. Donohue (1960) 367 U.S. 820), the United States Supreme Court considered a challenge by members of the Wisconsin State Bar to an order of the Wisconsin Supreme Court requiring all attorneys to become bar members. The plaintiff, a Wisconsin attorney, had paid

his dues under protest and sued for a refund, claiming that the state bar used his dues to engage in political activities which he opposed and that, by coercing him to join the bar and support its political activities, the Wisconsin Supreme Court order integrating the state bar was unconstitutional.

The United States Supreme Court concluded that by integrating the bar the Wisconsin Legislature and Supreme Court had advanced the public interest " 'by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice' " (*Lathrop*, supra, at pp. 831-832). Relying on its analysis in *Hanson*, supra, 351 U.S. 225, the court stated that "the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." (*Lathrop* at p. 843.) Several points underlying this holding have particular significance to the instant case.

First, it is significant that the court considered the *regulatory* function of the Wisconsin State Bar to be the primary justification for the compulsory membership requirement. (See Schneyer, *The Incoherence of the Unified Bar Concept* (1983) Am.B.Found.Res.J. 1, 54-55 ["Basically, Brennan saw the state bar as a public agency created to fund and administer regulatory or governmental programs."].) Second, the court employed language reminiscent of its commerce clause decisions. This suggests that

the state's regulatory or police power, similar in scope to Congress' commerce clause power (see ante, fn. 2), was the actual source of authority underlying integration of the bar. (Accord Herron v. State Bar (1944) 24 Cal.2d 53, 64.) Both these points emphasize the court's identification of the justifying governmental interest as the advancement of the delivery of quality legal services to the public. Finally, the court implicitly balanced the state's interest in regulating the legal profession with what, in that case, appeared to be a minimal intrusion into the attorneys' associational and speech rights.[3] (Schneyer, *The Incoherence of the Unified Bar Concept*, supra, at p. 51.)

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[3] The court emphasized that "the bulk of State Bar activities" were involved in raising educational and ethical standards, with the ultimate objective of improving the quality of legal services available to the public. (*Lathrop*, supra, 367 U.S. 820, 843.) Thus, the court found that the allocation of bar resources to political activities was minimal. More recent decisions have established, however, that even slight interference with an individual's speech or associational rights violates the First Amendment. (Chicago Teachers Union v. Hudson, supra, 475 U.S. at p. ___ [106 S.Ct. at p. 1075]; Ellis v. Railway Clerks, supra, 466 U.S. at pp. 442-444.)

Further, the court indicated that because the membership requirement was limited "to the compulsory payment of reasonable annual dues," it considered insignificant any infringement upon members' associational rights. (*Lathrop*, supra, 367 U.S. at p. 843.) Again, recent cases establish that the First Amendment protects an individual's rights not to associate and not to speak – the so-called "negative speech rights" – just

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The court managed to avoid the plaintiff's claim that the bar's use of his mandatory dues to support political activities violated the First Amendment by finding the record insufficiently developed in this regard. (*Lathrop*, supra, 367 U.S. 820, 845-846.) It is significant to the case before us, however, that only four of the justices deemed the constitutional issue not ripe for adjudication (Chief Justice Warren and Associate Justices Brennan, Clark and Stewart), while five justices considered the issue to be squarely presented. Of these five, two found the use of objecting members' mandatory dues for political purposes to be constitutional (id. at p. 865 [Harlan, J., conc. in judgment, joined by Frankfurter, J.]), two found such use to be unconstitutional (id. at p. 871 [Black, J., dis.]; id. at pp. 884-885 [Douglas, J., dis.]), and one considered the practice of law to be a "special privilege" and thus not a "right" protected by the First Amendment.[4] (Id. at p. 865 [Whittaker, J., conc. in result].) Moreover, because the *Lathrop* majority explicitly detailed the particular facts it

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as it protects an individual's rights to associate and to speak. (Pacific Gas & Electric Co. v. Public Utilities Commission of California (1986) 475 U.S. 1, 10-11; Roberts v. United States Jaycees (1980) 468 U.S. 609, 623; *Abood*, supra, 431 U.S. at pp. 234-235; see also West Virginia State Board of Education v. Barnette (1943) 319 U.S. 624.)

[4] The United States Supreme Court has since "rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' " (Sugarman v. Dougall (1973) 413 U.S. 634, 644 [quoting Graham v. Richardson (1971) 403 U.S. 365, 374].)

would have needed to address the First Amendment question (id. at pp. 846-847), it appears that, had the record been sufficiently developed in these regards, the entire court would have agreed that the First Amendment issue was squarely presented. Indeed, the court subsequently characterized Lathrop by stating that "[t]he only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached." (*Abood*, supra, 431 U.S. at p. 233, fn. 29.)

Thus, at the very least, *Lathrop*, supra, 367 U.S. 820, supports the proposition that use of the mandatory bar dues of objecting members for political and ideological purposes presents a clear constitutional question. Subsequent cases have established that even the generalized allegations found wanting in *Lathrop* are sufficient to raise the First Amendment challenge. (See *Abood*, supra, 431 U.S. at p. 241; Arrow v. Dow (10th Cir. 1981) 636 F.2d 287, 289.)

The majority in this case avoids the constitutional issue by labeling the State Bar as a "governmental agency," and concluding that a "governmental agency may use *unrestricted* revenue . . . for any purposes within its authority." (Maj. opn, at p. [typed opn. at p. 24], italics added.) What the majority fails to recognize, however, is that under federal constitutional law the use of objecting members' mandatory dues for political or ideological purposes is *not unrestricted*. *Abood*, supra, 431 U.S. 209, and its progeny make this abundantly clear as I shall further explain in the following section.

Further, the majority's effort to distinguish the California State Bar from the integrated bars of other states,

including Wisconsin, whose courts have uniformly applied the *Abood* holding to analyze the question of use of mandatory bar dues (see post, pp. ___ - ___ [typed opn., pp. 15-16]), is unpersuasive. Simply saying that none of these states' bars "rest upon a constitutional and statutory structure comparable to that of the California State Bar" does not explain why such a distinction renders the California State Bar immune from the First Amendment constraints, while the Wisconsin Bar is not. The United States Supreme Court's decision in *Lathrop*, supra, 367 U.S. 820, clearly supports the proposition that an integrated bar's use of mandatory dues of objecting members for political or ideological causes is subject to constitutional scrutiny. It was not until the decision in Abood v. Detroit Board of Education, supra, 431 U.S. 209, however, that the court explicated the First Amendment issue.

C. *The Constitutional Issue*

In *Abood*, the United States Supreme Court first addressed the constitutional issues raised when a union, or, as I would hold, an integrated state bar, spends objecting members' dues for political or ideological purposes. Because the freedom to associate for the purpose of advancing ideas and beliefs is protected by the First Amendment, the court reasoned that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment." (*Abood*, 431 U.S. at p. 234.) Recognizing further that the First Amendment is violated when one is "compelled to make, rather that prohibited from making, contributions for political purposes" (id.), the court concluded that the

Constitution "prohibit[s the state] from requiring [an individual] to contribute to the support of an ideological cause he may oppose as a condition of holding a job. . . ." (Id. at p. 235.)[5]

Thus, *Abood* holds that the First Amendment prohibits the state from coercing an individual, by threatening the loss of his livelihood, to financially support ideological or political causes to which he objects. (*Abood*, supra, 431 U.S. 209, 235-236; *Ellis*, supra, 466 U.S. 435, 455; cf. Wooley v. Maynard (1977) 430 U.S. 705, 715; Pacific Gas & Electric Co. v. Public Utilities Commission of California, supra, 475 U.S. at p. 9; PruneYard Shopping Center v. Robins (1980) 447 U.S. 74, 100.) The event that triggers the constitutional inquiry is the state's authorizing, or compelling, support of political or ideological causes through the coercive threat of the loss of one's livelihood for refusing to contribute. Attorneys are forced

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[5] In DeMille v. American Federation of Radio Artists (1947) 31 Cal.2d 139, this court rejected the plaintiff's contention that union expenditure of a special assessment for a political cause with which he disagreed was compelled speech and thus violated the First Amendment. We distinguished the political use of compelled union fees from the flag salute cases (e.g. West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624) by reasoning that the "member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest." (DeMille, supra, at p. 149.) We held that once the member pays any dues or assessments to the association, they "become the property of the association and any severable or individual interest therein ceases upon such payment." (Ibid.) *Abood*, supra, 431 U.S. 209, *Ellis*, supra, 466 U.S. 435 and *Hudson*, supra, 475 U.S. 292 have since invalidated this line of reasoning.

to join the State Bar as a condition precedent to practicing law in the state, just as employees are forced to support unions under provisions for union and agency shops. While the state's need to regulate the legal profession may justify such coercion, it does not justify compulsory financial support of political or ideological causes by objecting members.

Thus, when the State Bar spends a portion of compulsory membership dues on political or ideological causes rather than on regulatory functions, the identical First Amendment concerns which faced the United States Supreme Court in *Abood*, supra, 431 U.S. 209, are presented. Recognizing these concerns, every other court that has considered First Amendment challenges to state bar political expenditures has applied the *Abood* analysis. (See Gibson v. The Florida Bar (11th Cir. 1986) 798 F.2d 1564, 1568; Falk v. State Bar of Michigan (1981 411 Mich. 63, 106 [305 N.W.2d 201, 213] [Falk I]; Falk v. State Bar of Michigan (1983) 418 Mich. 270, 290-91 [342 N.W.2d 504, 410] [Falk II], cert. den. (1984) 469 U.S. 925; Reynolds v. State Bar of Montana (Mont. 1982) 660 P.2d 581, 581-582 [without citing *Abood*, court ordered refund to objecting members of dues spent for political activities]; Petition of Chapman (1986) 128 N.H. 24, 35-36 [509 A.2d 753, 755] [N.H. State Bar]; Arrow v. Dow (D.N.M. 1982) 544 F.Supp. 458, 460 [N.M. State Bar]; Schneider v. Colegio de Abogados de P.R. (D.P.R. 1983) 565 F.Supp. 963, 965, on remand, (D.P.R. 1988) 682 F.Supp. 674, 683-684 [bar association of P.R.]; Hollar v. Government of the Virgin

Islands (3d Cir. 1988) 857 F.2d 163, 170 [bar association of the Virgin Islands].)[6]

I would join the jurisdictions that apply *Abood*'s constitutional analysis. Indeed, as the cited decisions clearly demonstrate, federal constitutional law compels that analysis. As I explain in the next section, simply labeling the State Bar as a "governmental agency" does not the majority to the contrary notwithstanding, except this case from First Amendment analysis.

II. *Governmental Expenditure of Mandatory Dues Is Not Equivalent to Governmental Expenditure of Taxes*

The majority errs further in broadly stating – without benefit of authority – that a "governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority." (Maj. opn. at p. [typed opn. at p. 23].) I agree that such a rule would apply to revenue derived from general taxes. It is well established that taxpayers may be required to financially support governmental programs and messages to

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[6] In a pre-*Abood* constitutional challenge to state bar expenditures for political and ideological causes (Sams v. Olah (1969) 225 Ga. 497), the Georgia Supreme Court quoted its holding in Machinists v. Street (1961) 217 Ga. 351 [122 S.E.2d 220], after remand in 367 U.S. 740: "[A] labor union might be enjoined from using its funds for political purposes against the wish of an individual member, [because] this was a use of funds for purposes other than collective bargaining, the legitimate purpose of the union. . . ." (*Sams*, supra, 225 Ga. at p. 508.) Thus the *Sams* court applied essentially the same reasoning the United States Supreme Court later used in *Abood*, supra, 431 U.S. 209.

which they are ideologically or conscientiously opposed. (See, e.g., Graves v. Commissioner (6th Cir. 1978) 579 F.2d 392, 392 [Quakers must pay income tax despite contravention of religious principles]; Autenreith v. Cullen (9th Cir. 1969) 418 F.2d 586, 588 [conscientious objector must pay income tax despite use of taxes to fund warfare]; Crowe v. Commissioner (8th Cir. 1968) 396 F.2d 766, 767 [citizen must pay income tax despite disagreement with use of taxes to support federal welfare system]; United States v. Lee (1982) 455 U.S. 252, 262 [Amish employer must pay social security tax despite contravention of religious principles].)

Similarly, I perceive no First Amendment violation in the expenditure of revenues from license fees for purposes substantially related to regulation of the particular profession or industry. Indeed, this court has validated the State Bar Act "as a regulatory measure under the police power . . . and . . . held that the reasonable expenses necessary to pay the costs of enforcement of the act . . . may be imposed upon the membership in the form of fees or dues. [Citations.]" (Herron v. State Bar, supra, 24 Cal.2d at p. 64.)

We face a far different situation, however, when we consider the expenditure by a state agency of dues paid by a small and limited segment of the public, imposed as a condition precedent to the exercise of a profession, and expended for purposes not related to regulation of the profession. The Court of Appeal decisions to which the majority points do not support its conclusion that the source of revenue is "immaterial" to a determination of the propriety of its expenditure. To the contrary, when the revenue in question is derived from mandatory dues as a condition precedent to the practice of a profession, the ends to which the money is devoted are highly material.

In Miller v. California Commission on the Status of Women (1984) 151 Cal.App.3d 693, the plaintiffs filed a "taxpayers' action for declaratory and injunctive relief seeking to abolish the commission. . . ." (Id. at pp. 695-696.) Without explicitly denoting the source of funds, the opinion refers throughout to the commission's use of "public resources," and in the predecessor case (Miller v. Miller (1978) 87 Cal.App.3d 762), to the use of "public funds," to fund the commission's expenses. Because of the absence of any contrary indication in either of the *Miller* opinions or in Government Code section 8240 et seq. authorizing formation of the commission, one can only deduce that the "public resources" or "public funds" referred to in the *Miller* decisions were general taxes. Consequently, *Miller* stands only for the proposition that a governmental agency may spend funds derived from general taxes for any purposes within its authority, a concept well supported by precedent, but unchallenged in, and inapposite to, the case before us.

The other decision to which the majority refers, Erzinger v. Regents of University of California (1982) 137 Cal.App.3d 389, involved a claim by university students that their right to the free exercise of religion was violated by a portion of their mandatory registration fee being used to provide abortions, abortion counseling and abortion referrals through the student health services. The Court of Appeal analogized the payment of student registration fees to the payment of taxes, and applied a well settled line of authority holding that the "right to free exercise of religion does not justify refusal to pay taxes. . . ." (Id. at p. 393 [citing Autenreith v. Cullen, supra, 418 F.2d 586].) Whether or not the Court of Appeal

correctly analogized student registration fees to general taxes is debatable, but in any event this court is not bound by *Erzinger*. More importantly, I do not consider the issues in the two cases sufficiently similar to make *Erzinger* applicable to the instant case.

The students in *Erzinger* charged the University was interfering with their right to free exercise of religion, not their speech and associational rights. Unlike plaintiffs here, the *Erzinger* plaintiffs were not compelled to become members in an association, the threshold event which triggers First Amendment scrutiny of governmental action for violation of the constitutionally protected speech and associational rights. (See ante, p. [typed opn., p. 15].) Furthermore, the registration fees at issue in *Erzinger* were used strictly to finance health care within the paying group, as compared to the instant case where the State Bar fees at issue are allegedly used in part to promote political and ideological causes of concern to the general public.

Moreover, a student denied admission for failure to pay registration fees has more options, and is injured far less, than an attorney denied the right to practice law for failure to pay bar dues. It is obviously a greater hardship for the attorney to move to a different state and qualify there for admission to practice than it is for a student to enroll in a different college or university. Consistent with this distinction, courts have recognized that the pursuit of one's livelihood, be it the practice of law or some other profession, is a fundamental right. (Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 281; Anton

v. San Antonio Community Hospital (1977) 19 Cal.3d 802, 823.)[7]

Further, the purported analogy between taxes and mandatory dues has been questioned, and rejected, by courts and commentators alike. In Young Americans for Freedom v. Gorton (Wash. 1978) 588 P.2d 195, for example, the plaintiffs sought to prevent the Washington State Attorney General from using general tax revenues to finance the filing of amicus briefs in support of ideas to which the plaintiff taxpayers objected. The plaintiffs argued that taxes are the equivalent of mandatory union dues and thus the attorney general's use of taxes to fund advocacy of ideas was proscribed by *Abood*, supra, 431 U.S. 209. The Washington Supreme Court found "no viable merit" to the plaintiff's contention that general taxes and union dues are interchangeable sources of revenue for First Amendment purposes. (Id. at p. 200.)

Federal courts, in considering constitutional challenges to the use of integrated bar membership dues for political activities, have consistently rejected the claim that they have no jurisdiction by operation of statutes

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[7] In determining that a physician's hospital privileges are a vested fundamental right, the court held that a primary consideration was whether the interest in question " 'directly relates to the pursuit of [one's] livelihood.' " (Anton v. San Antonio Community Hospital, supra 19 Cal.3d at p. 823 [quoting Edwards v. Fresno Community Hosp. (1974) 38 Cal.App.3d 702, 705].) By this standard, the practice of law is clearly a fundamental vested right. This conclusion is further supported by the United States Supreme Court's determination that the right to practice law is fundamental and thus protected by the privileges and immunities clause. (Supreme Court of New Hampshire v. Piper, supra, 470 U.S. at p. 281.)

that prevent the federal courts from considering questions concerning the proper use of state taxes. (Levine v. Supreme Court of Wisconsin (W.D. Wis. 1988) 679 F.Supp. 1478, 1488-1489 overruled on other grounds in Levine v. Heffernan (7th Cir. 1988) ___ F.2d ___ [1988 U.S. App. LEXIS 17722] [Tax Injunction Act, 28 U.S.C. § 1341]; Schneider v. Colegio de Abogados de Puerto Rico (D.P.R. 1982) 546 F.Supp. 1251, 1275 [Butler Act, 48 U.S.C. § 872].)

In *Abood*, supra, 431 U.S. 209, Justice Powell observed that "[c]ompelled support of a private association [by payment of dues was] fundamentally different from compelled support of government [by payment of taxes because] government is representative of the people . . . [while] a union . . . is representative only of one segment of the population, with certain common interests." (*Abood* at p. 259, fn. 13 [Powell, J., conc.].)

Commentators have offered various reasons to distinguish taxes from mandatory dues for First Amendment purposes. Some have suggested that, as a practical matter, the sheer number of taxpayers and the complexity of government financing preclude making the *Abood* analysis applicable to objecting taxpayers. (Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association* (1983) 36 Rutgers L.Rev. 3, 24, fn. 125 [citing United States v. Lee, supra, 455 U.S. at pp. 259-261].) Others explain the distinction by arguing that the impact on objecting taxpayers from government "ideological" expenditures is less intrusive than the impact of controversial expenditures on dissenting union fees payors. (Tribe, American Constitutional Law (2d ed. 1988) § 12.4, fn. 14, p. 808.)

Whether or not one finds these arguments persuasive, one point is clear; a majority of the justices in Lathrop v. Donohue, supra, 367 U.S. 820, found that the use of mandatory state bar dues for philosophical, political or ideological causes implicates First Amendment concerns and principles. (See ante, pp. "___-___" [typed opn., pp. 11-12].) Labelling the State Bar a "governmental agency" cannot divert us from the First Amendment inquiry which *Lathrop*, supra, 367 U.S. 820, and Abood, supra, 431 U.S. 209, direct.

The majority engages in pure sophistry when it states that "no precedent supports the imposition of such [First Amendment] restrictions on a governmental agency." (Maj. opn., p. [typed opn., p. 26].) What the majority refuses to recognize is that most of the cases involving constitutional challenges to, and limitations on, the use of mandatory bar dues involved *governmental agencies* – state bar associations. (See, e.g., Schneider v. Colegio de Abogados de P.R., supra, 546 F.Supp. at p. 1264 [applying governmental immunity to Puerto Rican bar association because in disciplinary proceedings the bar acts in a prosecutorial capacity pursuant to statute]; Falk v. State Bar of Michigan, supra, 305 N.W.2d at p. 203 [State of Michigan acts through "combined efforts of the Michigan Supreme Court, Legislature and State Bar"]; Petition of Chapman, supra, 509 A.2d at p. 758 [New Hampshire Supreme Court "retains continuing supervisory authority over the [N.H. Bar] Association and its activities"]; Arrow v. Dow, supra, 544 F.Supp. at p. 459 ["control of dues [is] subject to the supervision of the New Mexico Supreme Court"]; Sams v. Olah, supra, 225 Ga. at p. 501 [Georgia State Bar is an "administrative arm of the [Georgia

Supreme C]ourt"]; Reynolds v. State Bar of Montana, supra, 660 P.2d at p. 582 [Weber, J., dis.] [Montana Supreme Court "has the power to control the organization of the State Bar"]; Hollar v. Government of Virgin Islands, supra, 857 F.2d at p. 167 [Virgin Islands Bar Association acts as prosecutor for the district court in attorney disciplinary proceedings].) These cases indisputably subjected state bars to the First Amendment scrutiny mandated by *Abood*. (Ante, pp. 15-16.) None of these cases analyzed the constitutional issue in terms of whether the relevant state bar was a governmental agency or private association. Instead, these cases reflect the recognition that *compelled membership* subjects an association whether private or governmental – to First Amendment constraints.

Indeed, while the majority agrees that "all *Lathrop* decided was that the *constitutional issues* concerning the use of bar dues *should be decided*; it did not decide those issues" (maj. opn. at p. [typed opn., p. 13], italics added [citing Abood, supra, 431 U.S. at p. 233 fn. 29]), the majority fails to reconcile its position with that of the United States Supreme Court: Since "the [Wisconsin] State Bar is a public and not a private agency" (Lathrop v. Donohue (1960) 10 Wis.2d 230, 242), the United States Supreme Court obviously considered public, or governmental, agencies to be subject to First Amendment scrutiny.

Moreover, other jurisdictions have recognized that the First Amendment constrains governmental agencies which compel membership. In Good v. Associated Students of University of Washington (Wash. 1975) 542 P.2d 762, for example, the Washington Supreme Court held

that "the state, through the university, may not *compel membership* in an association, such as the [Associated Students of the University of Washington because] . . . [t]hat association expends funds for *political and economic causes to which the dissenters object* and promotes and espouses political, social and economic philosophies which the dissenters find repugnant to their own views. *There is no room in the First Amendment for such absolute compulsory support, advocation and representation.*" (Id. at p. 768, italics added.) In Galda v. Bloustein (3d Cir. 1982) 686 F.2d 159 the plaintiffs objected to a governmental agency, the State University of New Jersey (Rutgers), requiring students to pay refundable fees to support the New Jersey Public Interest Research Group (PIRG). Acknowledging Rutgers' authority to levy and collect mandatory student fees, the court nevertheless held that *Abood* prevented it from requiring student support of PIRG if the plaintiffs could prove that PIRG supported political or ideological causes to which they objected.

Thus, the majority's assertion that subjecting governmental agencies to First Amendment restrictions is unprecedented does not withstand scrutiny. On the contrary, the weight of authority supports the view that when a state requires membership in a governmental entity, the authorized use of compelled dues for political or ideological purposes to which its members object is subject to constitutional constraints.[8]

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[8] The majority asserts that the position advocated in this concurring and dissenting opinion would subject the State Bar to the "worst of both the private and the governmental

(Continued on following page)

The issue left unresolved by *Lathrop*, whether the First Amendment is violated by the State Bar's use of mandatory dues for political or ideological causes to which some members object, has subsequently been addressed by analogy in the United States Supreme Court's union decisions. (See *Ellis*, supra, 466 U.S. 435; *Hudson*, supra, 475 U.S. 292.) These cases establish the constitutional standard by which State Bar expenditures must be scrutinized.

III. *The Constitutionality of Expending Objecting Members' Dues for Political and Ideological Causes*

A. *The Constitutional Standard*

A threshold issue precedent to any First Amendment analysis is whether the State Bar is legally authorized to

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(Continued from previous page)

worlds" by, on the one hand, subjecting it to constitutional restrictions in its use of dues and, on the other hand, precluding it as a state agency from endorsing political candidates and engaging in political campaigns. (Maj. opn., fn. 19.)

What this assertion fails to recognize is that if an association derives the benefit of the force of government to compel individuals to join the association and pay membership dues, then that association should be limited in its use of those dues and that indeed such limitation is commanded by the First Amendment to the United States Constitution. Such indifference to the First Amendment rights of the 115,000 members of the California State Bar is remarkable stemming as it does from acknowledged champions of First Amendment liberties. By focusing on the distinction between private and governmental entities, the majority's approach gives the State Bar the best of both worlds, and State Bar members the worst of both worlds. In contrast, by focusing on the distinction between compulsory and voluntary association, the concurring and dissenting opinion strikes a balance between the rights of the State Bar and its members.

make the expenditures to which plaintiffs object. Indeed, if the objectionable expenditures are precluded by statute or decisional law, there is no need for further inquiry. (*Ellis*, supra, 466 U.S. at pp. 444-445.)

The State Bar is, as the majority point out, statutorily authorized to expend funds for a broad range of activities.[9] (See maj. opn., ante, at p. [typed opn., p. 27].) However, it is only if, or when, an expenditure *is authorized* by law that we are required to analyze the constitutionality of the expenditure of objecting members' mandatory dues under the First Amendment. (*Ellis*, supra, at p. 447.)

The majority has properly identified Ellis v. Railway Clerks, supra, 466 U.S. 435 as the authority explicating the First Amendment analysis of expenditure by a compulsory association – either union or bar association – of objecting members' dues for political or ideological causes. *Ellis* mandates a three-step analysis to determine

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[9] In addition to the statutory provisions authorizing the bar to perform various regulatory functions, the Board of Governors is authorized to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public." (Gov. Code, § 6031, subd. (a).)

As the majority point out, however, the State Bar as a governmental agency is precluded from participating in election campaigns. (Stanson v. Mott (1976) 17 Cal.3d 206; see maj. opn., ante, at p. [typed opn. at p. 33].)

which political and ideological activities may be funded by mandatory dues over members' objections.

First, it must be determined whether the activity is "germane" to the purpose which justified compulsory membership in the bar in the first place. (Id. at p. 447.) The governmental interest in the delivery of quality legal services to the public and the improvement of the legal profession have been held sufficient to justify the infringement of First Amendment rights that may occur when attorneys are required to become bar members. (Lathrop v. Donohue, supra, 367 U.S. at p. 843; see text ante at pp. [typed opn., pp. 8-9].) When bar activities serve this interest,[10] or when expenditures are "necessarily or reasonably incurred" to finance activities that serve this interest, then such expenditures are considered "germane." (*Ellis*, supra, 466 U.S. 435 at p. 448.)

If an expenditure serves the state's interest in the delivery of quality legal services to the public and the improvement of the legal profession, the second step of the *Ellis* analysis requires that we determine "whether these expenses involve additional interference with the First Amendment interests of objecting employees. . . ."

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[10] The majority apparently equates the statutory *functions* of the State Bar with the state interests that may justify interference with members' associational rights. (See maj. opn. fn. 11.) It is hornbook law, however, that not all statutes rise to a level that justify state interference with basic constitutional rights. (See Tribe, American Constitutional Law, supra, § 12.2, p. 792.) As stated above, I adopt the United States Supreme Court's explication of the state interests which justify compulsory bar membership because I consider it to be authoritative.

(Id. at p. 456.) Finally, if the activities funded by the questioned expenditure do involve additional interference with First Amendment rights, we must determine "whether they are nonetheless adequately supported by a governmental interest." (Ibid.)

Thus, if a bar activity impinges upon First Amendment interests beyond the interference inherent in compulsory membership in the first instance, the bar must identify a governmental interest that justifies such additional interference. For example, the investigation of charges of attorney misconduct or the administration of the bar examination do not appear to interfere with members' First Amendment interests. Lobbying the Legislature for approval of the bar's proposed budget, however, would seem to implicate bar members' First Amendment rights. Nonetheless, such activity would appear justified by the governmental purposes underlying the requirement of compulsory membership in the State Bar. Without an adequate budget, the bar would be unable to conduct activities designed to advance the delivery of quality legal services to the public and to improve the legal profession.

I do not suggest the governmental interest that may justify additional interference with objecting bar members' First Amendment rights is *limited* to advancing the delivery of quality legal services or to improving the legal profession. As the majority suggests, in some circumstances the state's interest " 'in drawing upon [lawyers'] training and experience'" may adequately justify additional infringement of bar members' First Amendment rights. (See maj. opn., ante, at p. [typed opn. at pp. 27] [quoting *Falk I*, supra, 305 N.W.2d 201, 231].) However, it

must remain to the State Bar and its members to work out and, if necessary, to future decisions to determine, whether other activities which additionally interfere with objecting State Bar members' First Amendment rights are justified by a sufficient governmental interest. I turn to the activities at issue in this case.

B. *Applying the Standard to the Present Case*

In seeking declaratory relief, plaintiffs challenge the State Bar's expenditure of objecting members' dues to fund the cost of lobbying the Legislature, filing briefs amicus curiae, holding conventions of the State Bar Conference of Delegates, disseminating the speeches of its then president-elect and conducting a public information program concerning the election of justices.

Because this matter comes to us on summary judgment, the record is not sufficiently developed to apply the constitutional standard to most of the expenditures plaintiffs challenge. Thus, I shall undertake to discuss only the constitutional parameters within which the objectionable activities should be analyzed.

1. *Lobbying and Litigation Activities*

The constitutionality of the bar's expenditure of objecting members' dues to fund the cost of lobbying the Legislature or filing amicus curiae briefs cannot be determined in the abstract. The trial court would first have to determine whether the lobbying or litigation activity of which plaintiffs complain serves the governmental interest in advancing the delivery of quality legal services to

the public or improving the legal profession. If so, the court would then determine whether the challenged activity involves interference with First Amendment rights beyond that occasioned by compulsory bar membership itself. If it does, the State Bar would have the burden (see Railway Clerks v. Allen (1963) 373 U.S. 113, 122) of identifying some other governmental interest justifying such additional interference. (*Ellis*, supra, 466 U.S. 435 at p. 456.)

2. *Conference of Delegates*

There can be little doubt that some conference activities serve the state's interest in advancing the delivery of quality legal services to the public or in improving the legal profession. It also seems possible that some conference activities do not additionally infringe objecting members' First Amendment rights beyond the infringement inherent in compelled membership.

It appears likely, however, that expenditures for some conference activities would be found to impinge additionally upon objecting members' First Amendment rights. As to these expenditures, the bar would have the opportunity to identify a governmental interest justifying the expenditure. The record before us is insufficient to make this determination. Further, the trial court made no such determination and it would be the trial court's function in the first instance to do so. Thus, it would remain to the trial court to determine upon sufficient evidence whether any of plaintiffs' dues was expended in violation of their First Amendment rights.

3. *Bar Officers' Speeches and Public Information Programs*

Plaintiffs do not object to publication of bar officers' speeches or public information programs in general. Generally, insofar as publication of speeches or information programs serves the state's interest in advancing the delivery of quality legal services to the public or improving the legal profession, the bar may fund such activities with objecting members' mandatory dues. If such activities do serve these interests, the court would have to determine whether the challenged expenditures interfere with objecting members' First Amendment rights beyond the interference inherent in compulsory bar membership. If they do, the court would then determine if the challenged expenditures are nonetheless justified by some other sufficient governmental interest.

I do agree, however, with the majority that President-elect Anthony Murray's speech and the public education materials, by virtue of their content and timing, constituted the adoption of a specific position in a public election. Consequently, I agree that, as a matter of law, such election activities were not legally authorized expenditures under our decision in Stanson v. Mott, supra, 17 Cal.3d 206. That being so, no further analysis of those expenditures under the First Amendment is necessary.

IV. *Remedies, Reimbursement and Procedure*

A. *Declaratory and Injunctive Relief*

To the extent that plaintiffs could, within the purview of their pleadings, establish in further proceedings that the State Bar has used mandatory membership dues of

objecting members in excess of its legal authority to expend funds, or in violation of the First Amendment principles I have discussed, plaintiffs should be entitled to the declaratory relief they seek.

To the extent that they have established or could establish that funds were spent in excess of governing legal authority, they should also be entitled to injunctive relief to prevent such expenditures in the future. (Stanson v. Mott, supra, 17 Cal.3d at p. 223.)

B. *Reimbursement*

Plaintiffs have requested no monetary relief from the State Bar itself.[11] The only monetary relief plaintiffs have requested is for "an injunction [or writ of mandate to] issue compelling respondent and defendant members of the Board of Governors to reimburse the Treasury of the State Bar of California for all State Bar funds" wrongly expended. The State Bar, however, has not sought reimbursement from defendant governors and the authority of plaintiffs to seek reimbursement on the bar's behalf is dubious at best, as evidenced by plaintiffs' failure to assert any such authority. In any event, I agree with the majority that the governors cannot be held personally liable for reimbursement to the State Bar in view of the historical practices of the bar and in the absence of any record showing the governors knew any expenditures

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[11] With the exception of their prayer for costs and attorneys' fees.

were unauthorized or failed to exercise "reasonable diligence" in authorizing the subject expenditures. (Stanson v. mott, supra, 17 Cal.3d at pp. 226-227.)

C. *Constitutionally Mandated Procedure*

As to expenditures in violation of the First Amendment, the Constitution requires the bar to adopt procedures to allow members to identify the expenditures to which they may legitimately object and to prevent the bar from utilizing objecting members' dues for such purposes. (*Hudson*, supra, 475 U.S. at p. ___ [106 S.Ct. at pp. 1073-1074]; *Abood*, supra, 431 U.S. at p. 237, fn. 35.)

The majority has described such a procedure as "an extraordinary burden." (Maj. opn., ante, at p. [typed opn. at p. 20].) The procedure the majority envisions would require the bar, "whenever [it] proposed to advise the Legislature or the courts of its views on a matter, [to] *first* engage in the three-step analysis set out in Ellis v. Railway Clerks (1984) 466 U.S. 435." (Maj. opn. at p. , italics added [typed opn. at p. 19].) While the procedure envisioned by the majority might be "an extraordinary burden," the procedure mandated by the United States Supreme Court is not nearly so onerous.

As *Hudson*, supra, 475 U.S. at p. [106 S.Ct. at p. 1076] makes clear, " '[a]bsolute precision' in the calculation of the charge to [objecting members] cannot be 'expected or required.' [Citations.] Thus, for instance, the [association] cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The [association] need not provide [objecting members] with an exhaustive and detailed list of all its expenditures, but

adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." (*Hudson*, supra, 475 U.S. at p. , fn. 18 [106 S.Ct. at p. 1076, fn. 18].)

Therefore, contrary to the majority's assumption, the State Bar would not have to perform the three-step *Ellis* analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter. Instead, according to *Hudson*, supra, 475 U.S. 292 [106 S.Ct. 1066], the "the constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (Id. at p. [106 S.Ct. at p. 1078].) Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof. Code § 6140.1), the argument that the constitutionally mandated procedure would create "an extraordinary burden" for the bar is unpersuasive.

While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is notweworthy that unions representing government employees have developed, and have operated successfully within the parameters of, *Abood* procedures for

over a decade.[12] (See Morris, The Developing Labor Law (2d ed. 1983 ch. 29, p. 1417.) Indeed, the Michigan State Bar has operated under a modified *Abood* procedure since 1985. (Admin. Order No. 1985-1 (1985) 420 Mich. lviii.) I have no doubt whatever the State Bar could, by adapting the *Hudson* procedures or otherwise, devise procedures that are workable, practical and meet the constitutional requirements set out in Chicago Teachers v. Hudson, supra, 475 U.S. 292.

V. *Conclusion*

For the foregoing reasons, with the exception of the cause asserting the governors' personal liability to reimburse the State Bar for expenditures made in violation of Stanson v. Mott, supra, 17 Cal.3d 206, I would affirm the Court of Appeal judgment with directions to remand the

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[12] The majority suggests that the "more limited functions and constituency" of a labor union (maj. opn. fn. 12) properly subject it to *Ellis* analysis, while the State Bar's improvement of the administration of justice function render it inappropriate for application of the constitutionally mandated *Ellis* test. The majority's equation of statutory functions with justifying state interests again leads it astray. As I have shown, the relevant initial inquiry must be to determine which state interests justified compulsory bar membership in the first instance. Without benefit of briefing by the parties, I hesitate to make this determination unilaterally. I note, however, that at the time of integration of the bar, improvement of the "administration of justice" connoted interests far narrower than those the majority now ascribes to the phrase. (See, e.g., Winters, Bar Association Organization and Activities (1954) p. 171 [defining the field of the administration of justice as "[t]he organization, personnel and operation of the courts, the bar and their allied agencies and institutions"].)

case to the trial court for further proceedings consistent with this opinion.

KAUFMAN, J.

WE CONCUR:

PANELLI, J.
AGLIANO, Nat A.*

*Associate Justice, Court of Appeal, Sixth Appellate District, assigned by the Chairperson of the Judicial Council.

APPENDIX B

CERTIFIED FOR PUBLICATION

C O P Y

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THE THIRD APPELLATE DISTRICT

(Sacramento)

EDDIE KELLER, et al., Plaintiffs and Appellants, v. STATE BAR OF CALIFORNIA, et al., Defendants and Respondents.	3 Civ. 24124 (Super.Ct.No. 307168) (Filed May 23, 1986)

APPEAL from a judgment of the Superior Court of Sacramento County. Horace E. Cecchettini, Judge. Reversed with directions.

Ronald A. Zumbrun, John H. Findley and Anthony T. Caso for Plaintiffs and Appellants.

Hufstedler, Miller, Carlson & Beardsley, Robert S. Thompson, Laurie D. Zelon and Mary E. Healy; Herbert M. Rosenthal, Truitt A. Richey, Jr. and Magdalene Y. O'Rourke, for Defendants and Respondents.

"The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." (Cal. Const., art VI, § 9.) Under pain of criminal punishment, no person may practice law in California unless he is an active member of the State Bar. (Bus. & Prof. Code,

§§ 6125-6126.)[1] The Board of Governors of the State Bar, upon authorization from the Legislature, fixes and imposes an annual membership fee upon members of the State Bar, (§ 6140.) The fees are paid into the treasury of the State Bar, and become part of its funds. (§ 6144.) Plaintiffs are licensed attorneys and members of the State Bar. They assert that the State Bar and its Board of Governors utilize their compelled membership fees to promote political and ideological positions contrary to their beliefs and in violation of their First Amendment rights. The trial court granted summary judgment in favor of the State Bar and the members of the Board of Governors. The plaintiffs appeal.

The decisions of the United States Supreme Court "establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." (Abood v. Detroit Board of Education (1977) 431 U.S. 209, 233 [52 L.Ed.2d 261, 283].) "The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." (*Id.*, at pp. 234-235 [52 L.Ed.2d at p. 284]; citations and fns. omitted.) Those principles, the *Abood* court concluded, prohibited a school board

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[1] All further statutory references are to the Business and Professions Code unless otherwise indicated.

from requiring teachers, as a condition of holding a job in a public school, to contribute to the union for the support of political and ideological causes which they opposed and which were unrelated to collective bargaining. (*Id.*, at pp. 235-236.) These same First Amendment principles prohibit the State Bar from requiring its members, as a condition of practicing law, to contribute to the support of political or ideological causes they oppose and which are not germane to the purposes of the State Bar Act.

As we shall demonstrate, the State Bar has no constitutional or legislative authority to engage in purely political or ideological activities unrelated to its statutory purposes. Its powers are limited to what we will call its regulatory and administration of justice functions. The State Bar is free to act and speak on matters germane to these functions. It may also engage in conduct germane to its purposes even though that conduct has political or ideological ramifications so long as that activity does not impose additional infringements upon First Amendment rights not justified by a compelling governmental interest. But when the State Bar acts beyond these legitimate functions, we agree with plaintiffs that its members may not be constitutionally compelled to support political and ideological positions with which they disagree through compelled membership fees as the condition of the right to practice law. Since defendants have failed to establish that there are no triable issues concerning the constitutional and statutory legitimacy of the challenged conduct, we shall reverse the judgment and remand for further proceedings.

I

This litigation commenced when four of the plaintiffs filed a petition for a writ of mandate and complaint for declaratory and injunctive relief against the State Bar and the members of the State Bar Board of Governors. Plaintiffs allege that the State Bar, by and through the Board of Governors, has expended and will continue to expend substantial portions of the revenues derived through mandatory membership fees to advance political and ideological causes, including, but not limited to: (1) lobbying the California Legislature; (2) submitting amicus curiae briefs in cases taking positions in direct opposition to those held by some of its members; (3) financing meetings of the Conference of Delegates at which political and ideological causes are advanced; (4) publicizing the political and ideological speeches of its then president, Anthony Murray; and (5) financing a so-called public information project designed to disseminate to the general public a particular ideology regarding judicial retention elections. Plaintiffs further allege that they do not subscribe to many of the political and ideological beliefs advanced, and that they object to the use of their mandatory dues to further any such beliefs. Plaintiffs assert that to compel them to provide financial support for the advancement of any political and ideological beliefs, particularly those with which they disagree, violates their constitutional rights of freedom of speech and association, as guaranteed by the First and Fourteenth Amendments of the United States Constitution.[2] Plaintiffs

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[2] The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging

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sought a declaration that the defendants have violated their constitutional rights through the expenditure of

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freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Freedom of association is protected both by the free speech clause of the First Amendment and the due process clause of the Fourteenth Amendment. "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." (Healy v. James (1972) 408 U.S. 169, 181 [33 L.Ed.2d 266, 279].) Thus, "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (Roberts v. United States Jaycees (1984) ___ U.S. ___ [82 L.Ed.2d 462, 474].) "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause, . . . which embraces freedom of speech." (National Asso. For The A. C. P. v. Alabama (1958) 357 U.S. 449, 460 [2 L.Ed.2d 1488, 1498].) Consequently, "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." (Kusper v. Pontikes (1973) 414 U.S. 51, 56-57 [38 L.Ed.2d 260, 266]; see generally, Tribe, American Constitutional Law (1978) §§ 12-1 to 14-13, pp. 576-885; Emerson, *Freedom of Association and Freedom of Expression* (1964) 74 Yale L.J. 1.)

The California Constitution contains similar guarantees: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech

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mandatory bar dues and the use of the name of the State Bar of California for the advancement of political and ideological purposes; an injunction restraining the use of mandatory dues and the name of the State Bar to advance such purposes; and an injunction compelling the members of the Board of Governors to reimburse the treasury of the State Bar for the amount they authorized to be expended for political and ideological purposes since September 12, 1982.[3] In the alternative the plaintiffs sought similar relief in a proceeding for a writ of mandate. On two subsequent occasions the complaint was amended to name additional plaintiffs.

The defendants answered and admitted that they have expended portions of the revenue from compelled

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or press." (Cal. Const., art I, § 2, subd. (a).) "The people have the right to . . . petition government for redress of grievances, and assemble freely to consult for the common good." (Cal. Const., art I, § 3.)

[3] Plaintiffs also allege that the amount of the mandatory membership dues is set by statute and that the defendants have no discretion to lower the amount of the dues or to rebate a portion of the dues to members who object to the use of dues to advance political and ideological purposes. This allegation is erroneous. The board, not the Legislature, sets the amount of the annual dues, although it must be set within a maximum set by the Legislature. (§ 6140.) And the board may provide by rule for the waiver of the payment of the annual membership fee by any member, or any portion thereof, or any penalty thereon. (§ 6141.1.) Nonetheless, the record makes clear that the board believes it has the right to engage in political and ideological activity supported by membership fees of dissenting members, and it refuses to waive payment of any portion of such members' dues.

membership fees for purposes of lobbying the Legislature, filing amicus curiae briefs in litigation, financing meetings of the Conference of Delegates, publicizing the speeches of the president of the State Bar, and for financing a public education project on the judiciary. They deny, however, that these expenditures were in violation of the plaintiffs' constitutional rights. Defendants also set forth as affirmative defenses: (1) the failure to state a cause of action; (2) laches; (3) estoppel and/or unclean hands; and (4) that they are privileged to do the acts complained of due to legislative authorization and that they acted in good faith.[4] The trial court sustained the demurrer of the plaintiffs to the defense of estoppel and/or unclean hands without leave to amend.

Defendants moved for summary judgment, or in the alternative summary adjudication of issues or judgment on the pleadings. The plaintiffs countermoved for partial summary judgment.

Although the parties submitted much documentation in support of and in opposition to the respective motions, there is no real factual dispute about the State Bar and its recent activities. As the California Supreme Court recently recounted, "[i]n 1927, the Legislature adopted the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) establishing 'what is known as an "integrated" bar, i.e.,

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[4] Defendant Phyllis M. Hix answered separately from the other defendants. Although she answered the allegations of the complaint in the same manner as the other defendants, the only affirmative defenses she set forth were the failure to state a cause of action, and that her actions were privileged. Hix is not involved in this appeal.

an organization of members of the legal profession of the state with a large measure of self-government, performing such functions as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice.' (1 Witkin, Cal. Procedure (1970 ed.) Attorneys, § 157, p. 168.)" (Saleeby v. State Bar (1985) 39 Cal.3d 547, 557.)[5] Thus, the State Bar is authorized to establish an examining committee to "examine all applicants for admission to practice law" and thereafter to "certify to the Supreme Court for admission those applicants who fulfill[ed] the requirements. . . ." (§ 6046, subds. (a), (c).) Under the board's auspices, local administrative committees may investigate complaints about the conduct of members and may thereafter forward reports and recommendations to the board for action. (§ 6043, subds. (a), (c).) After a hearing, the board "has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproval, public or private, with such recommendation." (§ 6078.) "In those two areas, the bar's role has consistently been articulated as that of an administrative

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[5] "An integrated bar is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments." (Note, *First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined* (1980) 22 Ariz. L. Rev. 939, 941, fn. omitted.) It is to be distinguished from a voluntary bar association in which membership is optional with the lawyers of the state. (See Winters, Bar Association Organization and Activities (1954) p. 1.)

assistant to or adjunct of [the Supreme Court], which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. In the area of admission to practice, an applicant is admitted only by order of the Supreme Court which, upon certification by the bar's examining committee that the applicant fulfills the admission requirements, 'may admit such applicant as an attorney at law in all the courts of this State. . . .' " (*Saleeby, supra* at p. 557; citations omitted.) In addition to those duties, the State Bar enforces the law relating to the unlawful practice of law and illegal solicitation (§§ 6030, 6125-6131, 6150-6154), administers an arbitration system for fee disputes (§ 6200-6206), maintains a client security fund (§ 6140.5) and engages in other similar matters relating to the legal profession. For the sake of convenience, we shall refer to these activities as the State Bar's regulatory function.

In addition to its regulatory powers, the board is empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice. . . ." (§ 6031, subd. (a).)[6] This has been called the "laudable general purpose

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[6] In addition, the board is authorized by that subdivision to aid in "all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public."

In 1984 the Legislature restricted the administration of justice function by prohibiting the board, or anyone under its auspices, from engaging in any evaluation of appellate justices. Section 6031, subdivision (b) now reads: "Notwithstanding this section or any other provision of law, the board shall not

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of the [State Bar] act." (Herron v. The State Bar (1931) 212 Cal. 196, 199.) The bar's general counsel has described section 6031 as "the spring board for State Bar activities." (Use of Mandatory State Bar Dues, Assembly Committee on Judiciary, hearing 9/17/79, letter of Herbert M. Rosenthal, p. 111.) We shall call this the State Bar's administration of justice function. Some of these functions have been statutorily delineated; most have not. For example, the State Bar is mandated by statute to cooperate with and give assistance to the Commission on Judicial Performance (Gov. Code, 68725), to assist the Law Revision Commission (Gov. Code, § 10307), and to evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record. (Gov. Code, § 12011.5.)

In aid of all of its powers, the State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes."

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conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice of a court provided for in Section 2 or 3 of Article VI of the California Constitution without prior review and statutory authorization by the Legislature. [¶] The provisions of this subdivision shall not be construed to prohibit a member of the State Bar from conducting or participating in such evaluation, review, or report in his or her individual capacity. [¶] The provisions of this subdivision shall not be construed to prohibit an evaluation of potential judicial appointees or nominees as authorized by Section 12011.5 of the Government Code." (Stats. 1984, ch. 16, § 2, p. ___.)

(§ 6001, subd. (g).) In sum, the State Bar has two legitimate but divergent functions: one is to regulate the practice of law and the other to advance the administration of justice.

To carry out its functions, the State Bar is governed by a Board of Governors of 22 members, 16 of whom are members of the State Bar and 6 of whom are nonattorneys appointed by the Governor of the State with approval of the Senate. (§§ 6010, 6011, 6013.5.) Fifteen of the attorney members of the board are elected by the members of the State Bar from geographical areas established by the Legislature, and one member is elected by the board of directors of the California Young Lawyers Association. (§§ 6012, 6013, 6013.4.) The board elects the officers of the State Bar. (§§ 6021-6024.) The State Bar has established a Conference of Delegates, which consists of representatives of voluntary local and special bar associations. The conference meets once a year to consider proposals, many of which are intended for legislative action. The board has also from time to time established committees or sections open to members of the bar interested in particular areas of the law and which advise the board in those areas. The board has also appointed commissions, which include nonattorneys as members. The board employs lobbyists to assist in the bar's legislative program.

There are, concededly, "difficult problems in drawing lines" between activities related to the governance and regulation of the practice of law and engaging in recommendations for the improvement of the administration of justice on the one hand and those relating to ideological activities unrelated to such functions on the other hand. (See Abood v. Detroit Board of Education, supra, 431 U.S.

at p. 236 [52 L.Ed.2d at p. 285].) But the State Bar has made no showing in its motion for summary judgment that it did not use compelled membership fees to advance political and ideological causes which were not reasonably related to the regulation of the practice of law or the advancement of the administration of justice, or if germane, which do not impose additional and unjustified burdens on First Amendment rights. Although the State Bar expended substantial sums in lobbying the Legislature in years past, it did not undertake in its motion to show that its lobbying efforts were limited to the advancement of its statutory purposes. It has also underwritten some of the cost of the Conference of Delegates and the conference has occasionally strayed from matters relating to the administration of justice to more global issues of statecraft. In 1981, for example, the Conference of Delegates considered such issues as the Federal War Powers Act, limiting the United States presidency to a single six-year term, the participation of American athletes in the Olympics and Pan American games, and the federal budget. In 1982 the conference had scheduled consideration of resolutions on such issues as the repeal of the presidential proclamation concerning draft registration, a bilateral nuclear weapons freeze, a transfer of funds from the federal military budget to meet specified social needs, establishment of Dr. Martin Luther King, Jr.'s birthday as a national holiday, and legislative reapportionment.

In 1982 the State Bar engaged in two other activities which the plaintiffs abhor. First, was the use of compelled membership fees to finance and publicize the speeches of then president Anthony Murray. The second was the use

of compelled membership fees for a public education project. Both concerned judicial retention or recall elections. In September, Murray used the occasion of his swearing in as president to adopt what is described as a political and ideological position on judicial retention, and to announce the statewide public education project. Murray adopted the position that the only legitimate basis for voting not to retain a justice in a retention election is a showing of incapacity or misconduct. He described the views of those who disagree as "the idiotic cries of self-appointed vigilantes," and "hysterical 'soft-on-crime' rantings." Those who hold such views were depicted as "self-seeking prosecutors and lawyers who want to be judges," "unscrupulous politician[s]," "bullies," and "political mercenaries who are trying to pull down our legal system." Naturally, dissenters are offended by being forced to underwrite their own public vilification.

The public education project was designed to support and spread the views expressed by Murray. It consisted of materials sent to local groups with instructions on the best means of educating the public in accordance with those views. In order to promote the education project the board passed a resolution stating that it is the duty of attorneys to support an independent judiciary and calling upon members of the State Bar to take steps to educate the public on such matters. Murray utilized this resolution in seeking support for his views from local groups.

Plaintiffs object to being compelled to provide financial support for the advancement of any political and

ideological beliefs as a condition to practicing their profession. The defendants do not deny that they use compelled membership fees to promote political and ideological views. They assert that they have the right to do so, and that plaintiffs' suit is an attempt by a minority to impose their will upon the majority, or to stifle the speech of the majority.[7]

Although defendants' principal motion was for summary judgment, they originally supported the motion by only two innocuous declarations. Both were by the bar's

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[7] In fact, nothing in the record supports the conclusion that the views of the State Bar as adopted by the Board of Governors actually reflect the views of the majority of the membership. In September and October, 1980, the Field Research Corporation conducted a survey of the membership for the State Bar. With regard to legislative lobbying, 65 percent of the membership felt that the State Bar should actively lobby to affect the outcome of legislation which affects the practice and procedure of law, and another 25 percent felt the bar should take a position as an organization on such matters. With regard to legislation affecting the economic interest of lawyers, 46 percent felt the bar should actively lobby, and 25 percent felt the bar should take a position. With regard to areas of substantive law where lawyers have special expertise, 42 percent felt the bar should lobby, and 36 percent felt the bar should take a position. With regard to social issues in which there is substantial public controversy, only 9 percent felt the bar should lobby, and 27 percent felt the bar should take a position. On matters involving social issues upon which there is little or no public controversy, 6 percent felt the bar should lobby, and 17 percent felt the bar should take a position. An apt generalization could be that the further removed an issue is from the practice of law the smaller is the portion of the membership which will support bar activity in advancing a view.

legislative representatives and both of these lobbists declared that they represented the "State Bar of California as a public corporation and not the individual members." Subsequently, the defendants filed supplemental declarations in support of their motion. The declaration of Truitt A. Richey, Jr., an attorney employed in the Office of the General Counsel, described the bar's amicus curiae program. Mr. Richey asserted that it was his "observation that this participation [in the amicus curiae program] has been limited to issues basic to the State Bar, e.g., validity and interpretation of the State Bar Act or State Bar rules; validity and interpretation of legislation that the State Bar has sponsored; or the validity and interpretation of legislation or acts of court that can seriously affect the administration of justice and attorney-client relationships." Mr. Richey then set forth a brief description of the matters in which the State Bar had participated as amicus curiae since January 1977. Those descriptions support Mr. Richey's observation. Mary G. Wailes, an attorney and Secretary of the bar, filed a series of declarations. They generally described the legislative oversight of the State Bar, its relationship with its members and the public, the Conference of Delegates, and other organizational matters.

Code of Civil Procedure section 437c, subdivision (b) directs that a motion for summary judgment "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken." Subdivision (c) of that section mandates that the "motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." It follows then as a matter of statutory dictate that "[s]ummary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory." (Lipson v. Superior Court (1982) 31 Cal.3d 362, 374; citations omitted.)

As we have noted, defendants made no showing at all in support of their motion for summary judgment that the State Bar did not use compelled membership dues to advance political and ideological causes. No doubt the reason for that omission was the defendants' categorical position that the State Bar is a governmental agency and, like all government, may engage in purely political and ideological conduct. That contention is the lynchpin upon which this case hangs or falls.

The trial court granted summary judgment in favor of the defendants. It agreed that the State Bar is a governmental agency authorized to do the acts which plaintiffs find objectionable. While express constitutional or statutory authorization did not exist for all of the activities, the court felt such authority should be implied. The court found that the First Amendment is not a bar to these activities. With regard to the individual defendants, the court found that the plaintiffs failed to show they did not act with due care, and that it appeared they acted in good faith. Judgment was entered in favor of all defendants. This inevitable appeal followed.

II

We begin our journey by sketching the constitutional terrain we must traverse. In Railway Employes' Dept. A.F.L. v. Hanson (1955) 351 U.S. 225 [100 L.Ed. 1112], the United States Supreme Court was confronted with a claim that government-sanctioned compelled membership in a union as a condition of continued employment was a violation of the free speech clause of the First Amendment. The case involved a challenge to the federal Railway Labor Act (45 U.S.C. § 152), which provided that, notwithstanding any state law, a carrier and a union could agree that all employees were required to join the union. The Court upheld the provision, noting that the wisdom of the legislation was not at issue and that Congress could properly conclude that employees who receive the benefits of union representation in collective bargaining should be required to share financial support for it. (351 U.S. at pp. 233-235 [100 L.Ed. at pp. 1131-1132].) But the United States Supreme Court cautioned in *Hanson*: "If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." (*Id.*, at p. 235 [100 L.Ed. at p. 1132].) The record contained no evidence that the compelled union dues were used for any purpose other than collective bargaining, and the court held that on the record there was no more infringement or impairment of First Amendment rights than in the case of a lawyer who is compelled to be a member of an integrated bar. (*Id.*, at p. 238 [100 L.Ed. at pp. 1133-1134].)

In 1961, in *International Machinists* v. *Street*, 367 U.S. 740, [6 L.Ed.2d 1141], the Court considered another challenge to a union-shop agreement under the Railway

Labor Act. In that case there was evidence that the compelled union dues were used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." (367 U.S. at p. 744 [6 L.Ed.2d at p. 1147].) Rather than consider the constitutional questions, the Court construed the Act to prohibit the use of compulsory dues for political purposes, and remanded the case to the Supreme Court of Georgia to devise a remedy. (*Id.*, at p. 768 [6 L.Ed.2d at pp. 1160-1161].) As the high court later recounted, the *Street* court "held that the Act does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked. The Court did not express a view as to 'expenditures for activities in the area between the costs which led directly to the complaint as to "free riders," and the expenditures to support union political activities.'" (Ellis v. Railway Clerks (1984) ___ U.S. ___ [80 L.Ed.2d at p. 436], citations omitted.)

In a companion case to *Street*, the Court considered a challenge to the Wisconsin integrated bar on constitutional grounds. (Lathrop v. Donohue (1961) 367 U.S. 820 [6 L.Ed.2d 1191].) Although the court could not agree on an opinion, six of the members of the court were of the view that a state may constitutionally condition the right to practice law on membership in an integrated bar. (367 U.S. at p. 843 [6 L.Ed.2d at p. 1205], plurality opinion, and 367 U.S. at p. 849 [6 L.Ed.2d at pp. 1208-1209] concurring opinion.) The Court did not reach a decision

on whether an integrated bar may constitutionally use compelled membership fees for political and ideological purposes. The plurality opinion found that "the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]." (367 U.S. at p. 843 [6 L.Ed.2d at p. 1205].) The four member plurality found that the issue was not presented on the record before the Court, and accordingly the question whether an attorney may be compelled to provide financial support for political acitivities he opposes was not decided. (*Id.*, at pp. 847-848 [6 L.Ed.2d at pp. 1207-1208].)

The question of compulsory fees as a condition of employment arose again in Abood v. Detroit Board of Education, supra, 431 U.S. 209 [52 L.Ed.2d 261]. In that case the board had entered into a contract with a teachers' union pursuant to which all teachers who failed to join the union were required to pay the union a service fee equal to the regular dues of members, a so-called "agency shop" agreement. Although the Supreme Court recognized that compelling employees to contribute financial support to their collective bargaining representative does have an "impact" on their First Amendment rights, insofar as the service fees were used for collective bargaining, contract administration, and grievance adjustment purposes the fees were nevertheless permissible under the decisions in *Hanson* and *Street*. (431 U.S. at pp. 222-223, 232 [52 L.Ed.2d at pp. 276, 282].)[8]

[8] The history of the *Hanson*, *Street* and *Abood* trilogy was recently expostulated in San Jose Teachers Assn. v. Superior

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Abood presented the issue which had not been decided in *Hanson* and *Street:* whether compelled fees as a condition of employment could be used for political and ideological purposes unrelated to collective bargaining. This was so because the Michigan Court of Appeals had held that state law permitted the use of fees for such purposes, and the plaintiffs had alleged that such expenditures were made. On this question the Court had no difficulty in declaring that the agency-shop agreement and the state law which permitted it violated the federal constitution. "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. [Citations.] Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. [Citations.]" (431 U.S. at pp. 233-234 [52 L.Ed.2d at p. 283].) The First Amendment, the court further ruled, protects the right to contribute to an organization to spread a political message the contributor espouses, and the amendment is no less infringed where contributions are compelled rather than prohibited. (431 U.S. at p. 234 [52 L.Ed. at p. 284].)[9]

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Court (1985) 38 Cal.3d 839. As the California Supreme Court noted, the *Abood* court "reject[ed] the arguments of protesting employees that *Hanson* and *Street* should not control in *Abood* because of the distinctive nature of public employment." (*Id.*, at p. 846, fn. 2.)

[9] More recently, the high court declined to view a challenged impairment of asscciational rights "through the prism

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The *Abood* court did not hold that the union could not constitutionally spend funds for the expression of political and ideological views. Rather, it held that such expenditures must be financed from the charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will. (*Id.*, at pp. 235-236 [52 L.Ed.2d at pp. 284-285].) As the high court later noted, "*Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees." (Minnesota Bd. for Community Colleges v. Knight (1984) 465 U.S. 271, 291 [79 L.Ed.2d 299, 316, fn. 13.) In sum, the *Abood* court "found no constitutional barrier to an agency shop agreement between a municipality and a teachers' union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance

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of procedural due process protections necessary for deprivations of property. As in Abood, we analyze the problem from the perspective of the First Amendment concerns." (Chicago Teachers Union v. Hudson (1986) ___ U.S. ___ [89 L.Ed.2d 232, 245, fn. 13].) The First Amendment requires its own safeguards to "insure that the government treads with sensitivity in areas freighted with First Amendment concerns." (*Id.*, at p. ___ [p. 245, fn. 12].) Since the allowance of an agency shop is itself an impingement upon First Amendment rights, the government and the union have a responibility to minimize that impairment and to facilitate a dissenter's ability to protect his rights. (*Id.*, at p. ___ [pp. 247-248, fn. 20].)

adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." (Ellis v. Railway Clerks, supra, ___ U.S. ___ [80 L.Ed.2d at p. 441].) As we have noted, the *Abood* court recognized that difficult problems would arise in drawing lines between activities which are permissibly financed by compelled fees and those which are not. It did not attempt to draw such a line because the case was presented after a judgment on the pleadings without an evidentiary hearing. (*Abood, supra,* 431 U.S. at p. 236 [52 L.Ed.2d at 285.].)

The high court had occasion to draw that line in Ellis v. Railway Clerks, supra, ___ U.S. at p. ___ [80 L.Ed.2d at p. 441], when it was called upon "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." The court held that under the Railway Labor Act "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-mangagement issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the

bargaining unit." (*Id.*, at p. ___ [80 L.Ed.2d at p. 442].)[10] If the challenged expenditures are authorized by the Act, then the only constitutional issue remaining is "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." (*Id.*, at p. ___ [80 L.Ed.2d at p. 447].)

The central question in this case is whether the constitutional limitations of *Abood* apply to an integrated bar association. Stated another way, the issue is whether a lawyer, as a condition to becoming and remaining an attorney with the right to practice law, may be required to join and pay membership dues to an organization which uses a portion of those dues not to foster its legitimate purposes but rather to finance political and ideological ideas contrary to his or her own beliefs. We find the principle of *Abood* to be applicable and controlling because we discern no persuasive reason why lawyers should be treated differently than other public or private persons for First Amendment purposes and because we conclude that the State Bar, when acting in its administration of justice function, speaks for itself and not the State

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[10] In Chicago Teachers Union v. Hudson, supra, ___ U.S. ___ [89 L.Ed.2d 232], the court adhered to the view that a dissenting employee may not be required to support financially any ideological causes not germane to the union's duties as a collective bargaining agent. (*Id.*, at p. ___ [89 L.Ed.2d at p. 244].) The court expressly declined to consider whether a dissenting employee may be required to contribute to non-germane, non-ideological expenditures. (*Id.*, at p. ___ [89 L.Ed.2d at p. 245, fn. 13].)

of California and consequently is more analogous to a labor union than to government. Indeed, as the plurality opinion in *Lathrop* forecast, the case involving an integrated bar is no different from the union-shop agreement at issue in *Hanson*. (367 U.S. at p. 842 [6 L.Ed.2d at p. 1205].)

The historical underpinnings of the practice of law do not support the defendants' position that compelled membership fees may be utilized to promote political and ideological positions unrelated to the practice of law or the administration of justice. For many years the right to practice law was regarded as a mere privilege upon which the state could place such conditions and restrictions as it saw fit. (Cohen v. Wright (1863) 22 Cal. 293, 323.) Indeed, in *Lathrop* at least one justice relied upon that ground. (367 U.S. at p. 865 [6 L.Ed.2d at p. 1218], concurring opinion of Whittaker, J.) That earlier view has now been thoroughly discredited. (Konigsberg v. State Bar of California (1957) 353 U.S. 252, 257 [1 L.Ed.2d 810, 816]; Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 238 [1 L.Ed.2d 796, 801].) Our own Supreme Court has found it impossible to consider admission to the profession to be a mere privilege. (Hallinan v. Committee of Bar Examiners (1966) 65 Cal.2d 447, 452, fn. 3.) Instead, the opportunity to practice law is a fundamental right protected by the Privilege and Immunities Clause of the federal Constitution. (Supreme Court of New Hampshire v. Piper (1985) ___ U.S. ___ [84 L.Ed.2d 205, 213].)

It has been equally well established that the protection of the First Amendment extends to those who are or would be lawyers. In Baird v. Arizona (1971) 401 U.S. 1

[27 L.Ed.2d 639], an applicant had been refused admission to the Arizona bar after she refused to answer a question concerning past associations. After the Arizona Supreme Court upheld the denial of admission, the United States Supreme Court reversed. The four justice plurality opinion noted that the First Amendment protects associational freedom and that a state cannot exclude a person from a profession solely because he is a member of a particular political organization or because he holds certain beliefs. (401 U.S. at p. 6 [27 L.Ed.2d at pp. 646-647].) The First Amendment limits a state's power to inquire into beliefs and associations and the state bears a heavy burden to show that such inquiry is necessary to protect a legitimate state interest. (*Id.*, at pp. 6-7 [27 L.Ed.2d at p. 647].) In short, "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law." (*Id.*, at p. 8 [27 L.Ed.2d at p. 647].) A fifth justice concurred because the State Bar's purpose in asking the question was to inquire into political beliefs, "[y]et the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs." (401 U.S. at pp. 9-10 [27 L.Ed.2d at pp. 648-649], concurring opinion of Stewart, J.) The same result was reached on similar facts in Re Stolar (1971) 401 U.S. 23 [27 L.Ed.2d 657]. Since it is clear that the associational rights of attorneys are protected by the First Amendment, and since those rights are infringed equally by compelled rather than prohibited contributions for political purposes, no plausible reason appears why *Abood* should not apply to integrated bar associations.

Likewise, the historical underpinnings of the California integrated bar do not support the defendants' contentions. The power of the Legislature to regulate the practice of law has long been recognized. In Ex Parte Gregory Yale (1864) 24 Cal. 241, at page 244, the Supreme Court said with regard to attorneys: "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute." When the Legislature determined to integrate the California bar, the Act was upheld on the basis that it was a reasonable exercise of the legislative power to regulate the practice of law. In State Bar of California v. Superior Court (1929) 207 Cal. 323, at page 334, the Court said: "When we turn to those sections of the State Bar Act which purport to invest the board of governors, or its administrative committees, with governmental functions and disciplinary powers we find that these uniformly and expressly have relation to the *practice* of the law." In Brydonjack v. State Bar (1929) 208 Cal. 439, at page 443, the court acknowledged that "the power of the legislature to impose reasonable restrictions upon the practice of the law has been recognized in this state almost from the inception of statehood."

The issue of compelled membership fees was upheld at an early date. In Carpenter v. The State Bar (1931) 211 Cal. 358, the petitioner had failed to pay his bar dues and penalties and he disclaimed liability for such payments. The Supreme Court said: "The validity of the State Bar Act as a regulatory measure under the police power

has been repeatedly upheld by this court. When that fact is conceded, it follows as a matter of course that the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues." (*Id.*, at p. 360; citations omitted.) Likewise, in Herron v. State Bar, supra, 24 Cal.2d at page 64, the Court noted that the State Bar Act is valid as a regulatory measure under the police power, and that "the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues."

The legislative power to regulate a profession was explained with regard to real estate brokers and salesmen in Riley v. Chambers (1919) 181 Cal. 589, at pages 592-593, as follows: "Nor can it be controverted that the right to engage in a lawful and useful occupation cannot, in effect, be taken away under the guise of regulation. On the other hand, it is equally true that a lawful and useful occupation may be subjected to regulation in the public interest, and that all regulation involves in some degree a limitation upon the exercise of the right regulated. The test is whether or not the limitation imposed is really by way of regulation only, is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the legislature, and whose exercise is one of the latter's most important functions." If an act is a valid regulatory measure, then reasonable fees imposed to defray the expenses attached

to the administration of the law may be imposed. (Shaffer v. Beinhorn (1923) 190 Cal. 569, 573.)

It was these authorities which the Supreme Court relied upon in upholding the integration of the State Bar, and the imposition of reasonable fees upon members. (See Carpenter v. The State Bar, supra, 211 Cal. at p. 360.) From these cases two principles may be derived. First, in the exercise of the police power the Legislature may validly regulate the practice of the legal profession. Second, the members of the legal profession may be charged reasonable fees to defray the costs of the regulation of the profession and the costs of implementing the State Bar Act and its purposes. Yet nowhere in these authorities is it suggested that it is within the power of either the Legislature or the State Bar to compel membership in a political organization or to require members of a profession to provide financial support for the advancement of political and ideological ideas which are unrelated to the regulation of the profession or the administration of justice.

The defendants assert that the State Bar is a public agency and that membership fees are actually taxes upon the right to practice law. They assert that the use of such fees for the advancement of political and ideological ideas is simply a case of the government adding its own voice to the many that it must tolerate, and is thus permissible under this court's decision in Miller v. California Com. On Status of Women (1984) 151 Cal. App.3d 693. In *Miller* we were confronted with a taxpayer suit seeking either to abolish the commission or to prohibit it from lobbying or promoting its views on measures to improve the status of women, as the Legislature had

expressly authorized. We rejected the challenge. We noted that government may no more compel someone to express a view than it may forbid someone from voicing one. Although it may not compel citizens to contribute to a nongovernmental entity for the support of political and ideological activity, this does not mean that government itself must be ideologically neutral. (151 Cal.App.3d at p. 700.) Government has legitimate interests in informing, in educating, and in persuading, and it may add its voice to the marketplace of ideas on controversial topics. (*Id.* at p. 701.) Nevertheless, it may not, in the guise of governmental speech, trammel the free speech rights of its citizens. (*Ibid.*)

Our decision in *Miller* is inapplicable here for two reasons. First, the commission was established by the government and authorized to speak on its behalf, but no one was forced to add his or her assent to the government's voice in advocating a belief. Second, the commission was funded by the government out of its general funds. No one was compelled to finance the government's voice as a condition of employment or the right to engage in a profession. In contrast, the State bar purports to speak on behalf of its members, and thus plaintiffs' voices are compelled to be added to those of the bar. And, of course, the plaintiffs are compelled to finance the bar's voice as a condition of engaging in their profession.

But even further, the State Bar is a unique organization which partakes of some governmental attributes and some nongovernmental characteristics. Because of its singular character, the State Bar cannot be deemed a regular state agency. As William Hamm, the Legislative Analyst,

testified before a legislative committee, "Article VI, Section IX, of the State Constitution creates the State Bar as a public corporation, and it makes Bar membership mandatory for all practicing attorneys in California. The Bar is not a regular state agency, and, as a consequence, its expenditures are not reviewed and approved by the Legislature as part of the budget process each year. The Legislature, however, does set a ceiling on the membership fees that the Bar may charge practicing attorneys. . . . [¶] The Bar is an administrative arm of the California Supreme Court in matters of admission and discipline of attorneys, the crediting and monitoring of law schools, and in regulating legal specialization. These activities are mandated by statute or court rules, and thus the Bar is required to undertake these activities. In addition to these mandatory activities, the Bar is authorized, but not required, to administer various other programs that the Bar deems necessary to advance the legal field." (Review and Briefing on Legislative Analyst Report on the State Bar, Special Legislative Investigating Committee on the State Bar, March 11, 1980.) It is this dichotomy of function that makes the State Bar "sui generis." (See Brotsky v. State Bar (1962) 57 Cal.2d 287, 300.) Thus for its mandatory functions, the State Bar and its officers and employees are public officers. (See e.g., Chronicle Pub. Co. v. Superior Court (1960) 54 Ca1.2d 548, 565-566.) But that does not make the State Bar the government or imbue it with the government's right to speak to political and ideological matters unrelated to the legal field.

It is true that the State Bar is designated a "public corporation." But as we shall endeavor to show, not all public corporations constitute government. Former Civil

Code section 284 defined a public corporation as follows: "public corporations are formed or organized for the government of a portion of the state." Thus it was that Bettencourt v. Industrial Acc. Com. (1917) 175 Cal. 559, at page 561, held that "[p]ublic corporations, therefore, under the controlling definition of the law are those corporations formed for political and governmental purposes and vested with political and governmental powers."[11] In State Bar of California v. Superior Court, supra, 207 Cal. 323, it was contended that the State Bar, despite its designation as such, could not be a public corporation because its purpose and function were not the "government of a portion of the state." The Supreme Court rejected that contention in this fashion: "It is to be noted in considering this contention that the constitution does not attempt to define the several sorts of corporations which may be formed by or in accordance with legislative action, but that the foregoing definition of what shall constitute public as distinguished from private corporations is purely of statutory origin. This being so it must be clear that the provisions of the Civil Code above quoted could not be held to constitute a limitation upon later legislation to create public corporations for other purposes than those relating to 'the government of a portion of the state.' It is a fact within general knowledge that the state legislature has, upon not a few occasions

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[11] Although the statute has long since been repealed, this definition of a public corporation has occasionally been repeated. (See. e.g., Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp. (1972) 24 Cal. App.3d 400, 407.)

since the adoption both of our present constitution and of the foregoing section of the Civil Code, provided for the creation of various kinds of public corporations or associations which did not have for their function or purpose the 'government of a portion of the state.' " (*Id.*, at p. 329.) Thus, while the State Bar is a public corporation, it is not a public body formed or organized for political or governmental purposes. In short, while the State Bar serves a public purpose and its officers may speak in the public interest to advance the administration of justice, it is not by that account the government. In the exercise of its administration of justice function the State Bar does not speak for the State of California or all of its citizenry. Instead, it speaks in its corporate capacity as a public corporation whose only members are attorneys licensed to practice law in California. (§ 6002.) Although its voice may advance a compelling state interest, it is nevertheless not governmental speech. Acting in its discretionary administration of justice capacity the State Bar must, therefore, be deemed a nongovernmental association. And as we noted in *Miller*, the Legislature "may not delegate the authority to a nongovernmental entity to extract funds for the support of political and ideological activity not directly related to the purpose for which the entity is given the power to levy." (Miller v. California Com. on Status of Women, supra, 151 Cal. App.3d. at p. 700.) Accordingly, the conclusion that government may add its voice to public controversies does nothing to undermine the objection to compelled membership and financial support for the political and ideological ideas alleged to have been espoused by the State Bar.

We likewise cannot accept the assertion that the membership fees required of attorneys are simply tax receipts which the government may spend as it likes. The fees do not purport to be taxes. (§ 6140.) The fees are imposed upon members of the State Bar regardless of whether they are practicing law. (§§ 6140, 6141.) The fees do not become a debt owed to the State Bar and the failure to pay them in itself cannot lead to criminal or civil actions, but only to suspension from membership in the Bar. (§ 6143.) And the fees may be waived. (§ 6141.1. See Estate of Stanford (1899) 126 Cal. 112, 117-120; Doctors Hospital v. County of Santa Clara (1957) 150 Cal.App.2d 53, 55-56.) More critical, however, is the fact that an integral part of the regulatory act is compelled membership in the State Bar. An attorney is not permitted to simply pay a license tax but decline to join the State Bar; he is required to become a member of the bar and pay membership fees. The failure to pay the fees does not directly deprive the attorney of the right to practice law; it is the suspension of membership which carries that result. (§ 6125.) It is thus clear that the fees are in fact membership fees imposed under the police power to regulate the practice of law, and as such they must be such as are reasonably necessary to pay the costs of regulation, together with the costs of aiding matters relating to the advancement of the administration of justice. (See Herron v. State Bar, supra, 24 Cal.2d at 64; Carpenter v. The State Bar, supra, 211 Cal. at 360.) To the extent such fees are used to advance political and ideological ideas unrelated to the regulation of the legal profession or the administration of justice, those fees stand on no different footing than the compelled agency-shop

fees required of Detroit's public school teachers as a condition of continued employment which were at issue in *Abood*. Because the State Bar speaks for itself rather than the state in the exercise of its discretionary administration of justice function, it is sufficiently analogous to a labor union to be treated similarly for First amendment purposes. "Certain characteristics of union organization and integrated bar organization make these two entities particularly susceptible to first amendment scrutiny. In each organization actual membership and/or compulsory financial support are required for continued employment in the particular field. Such compulsion is authorized by the state with respect to union agreements and established directly by state action regarding bar integration. Also, political and legislative activities are widespread in both entities." (Note, *First Amendment proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined, supra,* 22 Ariz. L. Rev. at p. 954.)

For all of these reasons, we conclude that the principles of Abood v. Detroit Board of Education, supra, 431 U.S. 209 [52 L.Ed.2d 261], apply to an integrated bar association. In so holding we note that all of the courts which have considered the question, although disagreeing on the consequences of their application, agree that the *Abood* principles apply to integrated bar associations. In Arrow v. Dow (1982) 544 F.Supp. 458, at pages 462-463, the United States District Court found *Abood* to be controlling in the context of the New Mexico State Bar's use of compelled membership fees for political and ideological purposes. Although declining to hold categorically that the bar was prohibited from spending bar dues for lobbying, the court concluded that "the lobbying efforts

presently under consideration were not directed to important governmental interests which would justify the infringement upon [dissenting members'] rights caused by using Bar dues to finance lobbying efforts." (*Id.*, at p. 463.) In Schneider v. Colegio de Abogados de Puerto Rico (1983) 565 F.Supp. 963, at page 978, the United States District Court held *Abood* to be controlling with regard to the Puerto Rican integrated bar. In a later decision the court refused to stay its judgment. (Schneider v. Colegio de Abogados de Puerto Rico (1983) 572 F.Supp. 957.) In Romany v. Colegio de Abogados de P.R. (1st Cir. 1984) 742 F.2d 32, the Court of Appeals held that in view of the fact that the Puerto Rican bar was working on a plan to avoid the use of dissenters' fees for ideological purposes, the District Court should have abstained from acting. However, the court agreed that *Abood* was applicable, and held that the District Court could properly enter an interim order to protect the dissenting members of the bar pending action by the local authorities. (742 F.2d at pp. 44-45.) In Falk v. State Bar of Michigan (1981) 411 Mich. 63, 305 N.W. 2d 201, at 217-218, a divided Supreme Court of Michigan, unable to agree upon a decision, remanded the case for an additional evidentiary hearing to develop the record concerning the bar's actitivies. Nevertheless, all the justices agreed that the *Abood* principles applied to the intregated bar of Michigan. Finally, our attention has been called to to a decision of the Supreme Court of Florida refusing to amend its integration rule. (The Florida Bar (1983) 439 So.2d 213.) In that decision the court held that the improvement of the administration of justice and the advancement of the science of jurisprudence are compelling state interests.

Citing *Abood*, the court concluded that those interests may be advanced by any means that are "germane" to that interest.[12] (*Ibid.*)

III

Our conclusion that the constitutional restrictions of *Abood* govern an integrated bar association leaves open the question of the scope of the activities in which the State Bar may engage without violating the First Amendment. We turn now to that question.

A

Lawyers do not surrender their First Amendment rights by joining the State Bar. Members of the bar, no less than other persons, maintain their constitutional rights of free speech and association. But as is the case with other persons, those constitutional rights are not absolute. (Roberts v. United States Jaycees, supra, ___ U.S. ___, ___ [82 L.Ed.2d at p. 475]; C. S. C. v. Letter Carriers (1973) 413 U.S. 548, 567 [37 L.Ed.2d 796, 814]; Konigsberg v. State Bar of California, supra, 366 U.S. at p. 49 [6 L.Ed.2d at p. 116].) Even protected First Amendment rights may be impinged upon "if the State demonstrates a sufficiently important interest." (Buckley

[12] The Florida court further concluded that the political activities of the bar were germane to those compelling state interests. On this point, we disagree. As we explain in the text, purely political activities, such as engaging in election campaigning, cannot fairly be construed to relate to the administration of justice and hence cannot be characterized as being germane to the permissible activities of the State Bar.

v. Valeo (1976) 424 U.S. 1, 25 [46 L.Ed.2d 659, 691].) But to justify such a constitutional intrusion, the state must demonstrate a compelling governmental interest. (Cousins v. Wigoda (1975) 419 U.S. 477, 489 [42 L.Ed.2d 595, 604]; National Asso. For the A. C. P. v. Alabama, supra, 357 U.S. at p. 463 [2 L.Ed.2d at p. 1500].)

Few would deny that the state has a compelling interest in promoting the improvement of the administration of justice and the advancement of jurisprudence. Clearly there is such a compelling, indeed even a paramount, interest. As Justice Williams powerfully recounted in his opinion in Falk v. State Bar of Michigan, supra, 411 Mich. 63, 305 N.W.2d at p. 228: "The fair and efficient use of the state legal system is paramount to the state's very existence. Without a legal system to make, interpret and enforce laws, without some mechanism to weigh and resolve conflicting claims, there is anarchy. [¶] As officers of the court, lawyers play an indispensable role in the administration of justice. The state must not only protect its legal machinery from abuse through such safeguards as the attorney grievance procedure but must also be mindful of the competence of attorneys, who are in a position to best assist, or most impede, the general public in securing justice. Authorizing the State Bar to aid the state in promoting improvements in the administration of justice is essential for the state's continued existence." We similarly conclude that the State Bar's statutory authorization "to aid in all matters pertaining to the advancement of the science of jurisprudence or to the

improvement of the administration of justice" embodies a compelling governmental interest.[13]

We also believe it is indisputable that the state has a sufficiently compelling interest in the regulation of attorneys to warrant an integrated bar. "The adequate protection of public interests, as well as inherent and inseparable peculiarities pertaining to the practice of law, require a more detailed supervision by the state over the conduct of this profession than in the case of almost any other profession or business." (In re Galusha (1921) 184 Cal. 697, 698.) The state's answer to this compelling need was to create an integrated bar which is largely self-governing and which provides essential assistance to the state in regulating and supervising the profession. (See State Bar of California v. Superior Court, supra, 207 Cal. 323.) Although an integrated bar constitutes a significant impingement upon the First Amendment rights of lawyers, that impingement is amply justified by the compelling governmental interest in the regulation of the legal profession. In *Abood*, the compelling governmental interest fostered by Congress was the maintenance of labor-management peace through union collective bargaining.

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[13] Jurisprudence, by definition, is "[t]he philosophy of law, or the science which treats of the principles of positive law and legal relations." (Black's Law Dict. (5th ed. 1979) p. 767.) The administration of justice, on the other hand, relates to the adjudication or adjustment of rights and duties in a legal system. It is concerned with how a legal system is managed and conducted. "Administration is an exercise of power in a concrete situtation for the accomplishment of private or public purposes." (Bodenheimer, Jurisprudence, the Philosophy and Method of the Law (Rev. ed. 1974) § 61. p. 284.)

Here the compelling state interests advanced by the Legislature are the regulation of attorneys and the improvement and advancement of jurisprudence and the administration of justice. Those functions constitute the State Bar's raison d'etre and form the framework against which the constitutional challenge must be judged.

B

In determining the scope of activities in which an integrated state bar may be permitted to engage, we apply the test set forth in Ellis v. Railway Clerks, supra, ___ U.S. ___ [80 L.Ed.2d 428]. There, in the context of a union-shop, the Supreme Court examined the First Amendment limitations upon the activities which a union can support with funds extracted from dissenters. (*Id.*, at p. ___ [p. 446].) Analogous limitations apply to integrated bar associations.

When the activity of the State Bar is clearly germane to either its regulatory or administration of justice function and that activity does not involve political or ideological causes, no constitutional barrier prohibits it. "At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.' " (*Ellis, supra*, ___ U.S. ___ [80 L.Ed.2d at p. 447], citation omitted.) Thus, for example, when the State Bar expends funds for the discipline of attorneys (§ 6040 et seq.) or to assist the Law Revision Commission (Gov. Code, § 10307), no First Amendment restrictions preclude those expenditures.

At the other extreme, the State Bar may not constitutionally use compelled dues for the support of ideological or political causes not germane to its two statutory purposes. Once again the analogy to the union-shop is apt: "The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." (*Ellis, supra,* ___ U.S. ___ [80 L.Ed.2d at p. 441].)

The more difficult question arises when the expenditure of the State Bar is for an activity which relates to its statutory purposes in some fashion but also implicates additional First Amendment concerns.[14] In that case the critical issue is whether the challenged expenditure is sufficiently related to the State Bar's statutory functions to justify its imposition upon objecting members. This requires, in the case of unions, that a line be drawn "between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on

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[14] In Chicago Teachers Union v. Hudson (1986) ___ U.S. ___, [89 L.Ed.2d 232] the high court found "it unnecessary to resolve any question concerning non-germane, non-ideological expenditures." (*Id.*, at p. ___, fn. 13 [89 L.Ed.2d at p. 245. fn. 13.].) We also find it unnecessary to reach that issue. It is possible for the State Bar, with the use of compelled dues, to engage in conduct which exceeds its statutory authorization but which does not advance any political, ideological or other free speech and associational interest. Since the State Bar has no power to act in matters unrelated to its statutory purposes. we need not decide whether the First Amendment also bars any ultra vires act with compelled membership dues.

dissenters." (*Ibid.*) A similar line must be drawn for the State Bar. The dividing line depends upon "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." (*Id.*, at p. ___ [p. 447.) In drawing that line it must be recalled that "by allowing the union shop at all, [the Supreme Court has] already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." (*Id.*, at p. 446.)

The test applied in *Ellis* consists of balancing the *additional* interference with First Amendment rights which such a challenged activity entails against an asserted governmental interest. Thus some activities which would not be permissible standing alone may nonetheless be allowed because they do not increase the infringement already resulting from the compelled, but justified, extraction. (*Ibid.*) The dissenters "may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." (*Id.*, at p. ___ [p. 447.) Other activities may raise more serious First Amendment concerns but may be permissible because the additional interference is supported by a sufficient governmental interest. (*Ibid.*) This governmental interest need not be sufficient to support the total infringement; it need only be sufficient to justify the additional infringement that the expense entails. (*Ibid.*)

C

We now apply the *Ellis* test to the activities challenged here. Some of the challenges can be resolved on the record before us. Others lack an adequate record and in keeping with the position taken by the *Abood* court, we decline to attempt to divine precise lines for those challenged expenditures in an evidentiary vacuum. Instead, as to those expenditures, we undertake only to set the broad perimeter around which the line must be drawn in light of the challenge.

Plaintiffs specifically challenge the State Bar's use of membership fees to underwrite the cost of lobbying the Legislature, filing amicus curiae briefs in selected cases, holding meetings of the Conference of Delegates, disseminating the speeches of its former president and establishing a public information program concerning election of justices. We consider those challenges in order.

1. Lobbying. In the agency shop context, it has been held that the propriety of lobbying activities with compelled contributions depends upon the nature of the lobbying. For example, in Robinson v. State of New Jersey (3rd Cir. 1984) 741 F.2d 598, at page 609, the court said: "So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees." On the other hand, in Beck v. Communications Workers of America (C.W.A.) (4th Cir. 1985) 776 F.2d 1187, at pages

1210-1211, a union's lobbying expenditures with nonmember fees were disallowed because some of those efforts ran far afield from the purposes of collective bargaining, and because the union made no effort to distinguish proper from improper lobbying activities. The court indicated, however, that some lobbying activities may be relevant to collective bargaining and hence may be proper.

In like fashion the State Bar may, without objection, engage in lobbying activities which are germane to its two statutory purposes. Since the State Bar is empowered to do all acts necessary or expedient for the attainment of its purposes (§ 6001, subd. (g)), the means it employes are generally not in issue. Thus the bar may elect to lobby the Legislature in order to promote the passage of laws which improve the administration of justice or which relate to the regulation and supervision of attorneys. But it is apparent that not all legislation is germane to the administration of justice or the regulation of the bar. A bill to create a new airport district, for example, does not relate to the administration of justice. It is equally obvious that the bar's right to lobby is not limited to procedural, as opposed to substantive, changes in the law. Not all improvements and advancements can be made by procedural changes. Thus, it is not lobbying per se that transgresses the constitutional line. Rather the question is whether the lobbying concerns matters relating to the State Bar's statutory functions. Lobbying activities to improve the administration of justice may relate to legislation which also has ideological overtones and may therefore arguably constitute some limited additional

infringement of the First Amendment rights of lawyers. In that case, the question is whether there is an "additional infringement of First Amendment rights beyond that already accepted, and . . . that is not justified by the governmental interests behind the [integrated bar] itself." (*Ellis, supra,* ___ U.S. ___ [80 L.Ed.2d at p. 447].) Consequently, the validity of particular lobbying expenditures must be determined upon an adequate evidentiary record, keeping in mind that it is the Bar which bears the burden of proving the validity of its lobbying expenditures. (Beck v. Communications Workers of America (C.W.A.), supra, 776 F.2d at p. 1211; see also Chicago Teachers Union v. Hudson, supra, ___ U.S. ___ [89 L.Ed.2d at p. 246].)

2. Amicus Curiae Briefs. Litigation expenses stand on the same footing as lobbying expenses. This much was recognized in *Ellis* where the court held that litigation expenses not having a direct connection with the bargaining unit may not be charged to objecting employees. The court acknowledged, nevertheless, that some litigation expenses are clearly chargeable to such employees as a normal incident of the duties of the union as the exclusive representative. By a parity of reasoning, the state's interest in the improvement of the administration of justice is sufficient to warrant the bar's participation in litigation which may affect the administration of justice. After all, a precedential judicial decision establishes the law of this state just as surely as a statutory enactment. Yet, it is apparent that not all lawsuits, simply because they are filed in a court, involve the administration of justice. The suit may only involve private litigants fighting over a personal dispute about which the State Bar

could not conceivably have a legitimate interest. The bar consequently cannot indiscriminately file amicus curiae briefs in lawsuits or otherwise engage in litigation. Thus, the resolution of the issue, once again, depends upon a proper record.

3. Conference of Delegates. The propriety of the meetings of the Conference of Delegates is also resolved by the decision in *Ellis*. There, with respect to union conventions, the court declared: "We have very little trouble in holding that [non-union employees] must help defray the costs of these conventions. Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions . . . seem to us to be essential to the union's discharge of its duties as bargaining agent." (*Id.* at p. ___ [80 L.Ed.2d at p. 442].) It is true that conventions have a "direct communicative content and involve the expression of ideas" and consequently implicate additional First Amendment concerns. (*Id.*, at p. ___ [80 L.Ed.2d at p. 447].) "Nonetheless, we perceive little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." (*Ibid.*) The meetings of the Conference of Delegates serve much the same function as union conventions. Much of the bar's efforts with respect to its litigation and lobbying activities have originated with the Conference of Delegates. We have previously noted that the conference has occasionally strayed from the bar's regulatory and

administration of justice functions, but that does not preclude the use of objecting members' dues altogether. So long as the Conference of Delegates serves the State Bar's statutory functions, the bar may properly use compelled dues to support that portion of the conference's activities.

4. Speeches of the President. Plaintiffs do not object to the publication of the president's speeches in general. Rather they object to the publication of former president Anthony Murray's speeches and viewpoints in 1982. We have recounted the essence of those speeches and viewpoints and suffice it say here that he adopted a specific position about a public election and compulsory bar dues were used to advocate that position. We agree with plaintiffs that the challenged expenditures were improper.

The Constitition of California, article VI, section 16, subdivision (a) provides in relevant part: "Judges of the Supreme Court shall be elected at large and judges of the courts of appeal shall be elected in their districts at general elections at the same time and place as the Governor." Thus the Constitution leaves the election of appellate court judges to the "free election" of the People. (Cal. Const., art. II, § 3; see Stanson v. Mott (1976) 17 Cal.2d 206, 218.) The right to participate in a free election is the most precious right our system of government accords its citizens for without it other rights, even the most basic, are illusory. (Williams v. Rhodes (1968) 393 U.S. 23, 31 [21 L.Ed.2d 24, 31].) Indeed, the First Amendment finds its fullest and most urgent application precisely in the conduct of political campaigns. (Patriot Co. v. Roy (1971) 401 U.S. 265, 272 [28 L.Ed.2d 35, 41].) Our state Supreme Court has recognized the overriding importance of free elections to the people of California. "[W]e examine with

a close and questioning attention every intrusion, subtle or direct, which impairs or affects the unconditional exercise of these perogatives." (Johnson v. Hamilton (1975) 15 Cal.3d 461, 469; see also Canaan v. Abdelnour (1985) 40 Cal.3d 703, 714; Stanson v. Mott, supra, 17 Cal.3d at pp. 218-219.) These principles apply whether the issue presented at the free election of the people is partisan or nonpartisan. (Galda v. Rutgers (3rd Cir. 1985) 772 F.2d 1060, 1064. See also Stanson v. Mott, supra, 17 Ca1.3d at pp. 217-218; First National Bank of Boston (1978) 435 U.S. 765, 785-786 [55 L.Ed.2d 707, 723].) In fact, it was precisely this type of "political" activity which was condemned in an agency shop situation in *Abood*. (431 U.S. at p. 235 [52 L.Ed.2d at p. 284].)

It is apparent from these authorities that the use of compelled fees for election compaigning is not merely a slight additional impingement on First Amendment rights; it is a substantial additional interference, resulting in the most grievous infringement possible. It is doubtful that any governmental interest can justify such an infringement, but the interests asserted here, substantial though they may be, do not.[15]

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[15] Nor do we find legislative authorization for the bar to engage in such political activities. Stanson v. Mott, supra, 17 Ca1.3d 196, involved a different, but related, situation. There the director of the state parks department authorized the department to expend $5,000 to promote the passage of an election bond measure to provide funds for the acquisition of park land. In a challenge to the use of departmental funds for election campaigning, the Supreme Court noted the serious

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We also must reject defendants' contention that these publications were simply a "public education program." In Stanson v. Mott, supra, 17 Cal.3d 206, the court recognized that the fair presentation of relevant information does not necessarily constitute election campaigning even though the information may relate to an election issue. (*Id.*, at p. 221.) The propriety of the expenditure depends upon the style, tenor and timing of the publication and whether it appears that the publication was designed primarily for the purpose of influencing the voters at an election. (*Id.*, at p. p.222, esp. fn. 8.) In light of the record before us, defendants' claim that they were merely educating the public borders on the specious. Murray's position, and the bar's project adopted to support that position, were both designed for the expressed purpose of influencing the voters. Defendants adopted a position on how and why the electors should cast their votes and then campaigned to convince the electorate to follow that

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constitutional questions such expenditures raised, both from the standpoint of distortion of the democratic electoral process and from the standpoint of using public funds, to which objecting electors had an equal right, to advocate a position contrary to their beliefs. (17 Ca1.3d at pp. 216-217; see also Mines v. Del Valle (1927) 201 Cal. 273, 287.) The court found it unnecessary to resolve the constitutional questions, however, because it held that legislative authorization for the use of public funds for election campaigning cannot be implied but must be given in clear and unmistakeable language. (*Id.*, at p. pp. 219-220. See also International Machinists v. Street, supra, 367 U.S. at pp. 768-769 [6 L.Ed.2d at pp. 1160-1161].) These same considerations are applicable here and we decline to find legislative authorization for the use of compulsory bar dues for election campaigning in the absence of clear and unmistakeable language to that effect. Since election campaigning is not statutorily authorized, it is not germane to the statutory purposes of the State Bar.

position. The bar's campaign included efforts to disparage the position, personalities and motives of members and others who held and urged opposite views. This was election campaigning pure and simple and no compelling governmental interest justified it. These publications violated the First Amendment rights of dissenting members of the bar.

5. Public Education Programs. As with the objection to the publication of the president's speeches and views, the plaintiffs do not challenge public education programs in general. They challenge only the specific 1982 program designed to influence judicial elections. This limited attack is well advised, for public informational programs will often be an important means by which the State Bar advances its statutory functions.[16] Still, the bar may not engage in election campaigning in the guise of disseminating information to the public. What we said with respect to the president's activities is equally applicable here. Parts of the bar's 1982 public education program were clearly election campaigning and the use of compulsory dues for that political purpose breached the constitutional barriers erected by the First Amendment.

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[16] As we have noted elsewhere in the margin, the Board of Governors of the State Bar is statutorily authorized to aid "such matters as concern the relations of the bar with the public." (§ 6031, subd. (a).) In furtherance of that purpose or its other statutory purposes the State Bar may engage, subject to the First Amendment constraints delineated in the text, in public information programs.

D

But within the perimeters of its statutory purposes and the confines of the First Amendment the State Bar is entitled to use compelled membership dues even though some members may object to the manner of their use. The State Bar, after all, is not just a trade union. Under its statutory mandate, the State Bar bears a special public responsibility and is endowed with a commensurate right to speak in the public interest on matters in aid of the improvement of the administration of justice. The touchstone is the germaneness, not the popularity, of its acts. The broad lines of germaneness are easy to sketch and some of them we have already sketched. Whether our state constitution should be amended to provide for less than 12 jurors clearly relates to the administration of justice; whether the federal government should adopt an economic policy of balanced budgets does not. Naturally, the fine lines are more difficult to draw. All line drawing, at the fringes, bears some stamp of arbitrariness. As the fineness of the distinctions becomes more pronounced, the path of the boundary becomes less distinct. Because of that inherent obstacle to perfect demarcations, no doubt, in the words of Justice Holmes, "some play must be allowed for the joints of the machine" of the State Bar. (Missouri, K. & T. R. Co. v. May (1904) 194 U.S. 267, 270; see also Ellis v. Railway Clerks, supra, ___ U.S. ___ [80 L.Ed.2d at 447].) For all that, there are lines to be drawn and boundaries to be respected. Contrary to its position asserted here, the State Bar does not have plenary power to rove about to right every wrong and speak to every issue. Just as it is not a trade union, neither is the State Bar a public ombudsman.

But when the State Bar does act within the confines of its statutory functions, the fact that some of its members may disagree with its actions is not constitutionally relevant. Analytically, the State Bar's statutory functions are comparable to the collective bargaining functions of a union that were considered in *Abood*. As the *Abood* court noted, "[t]o compel employees financially to support their collective-bargaining representatives has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." (Abood v. Detroit Board of Education, supra, 431 U.S. 209, 222, fn. omitted.) By the same token, plaintiffs and other members may have philosophical objections to specific activities undertaken by the State Bar. But so long as

those activities are consistent with the bar's statutory purposes and do not impose additional infringements on the First Amendment rights of dissenters which are not justified by a compelling governmental interest, the State Bar is free to engage in them.

But the lynchpin of the bar's position, that it is government entitled to speak politically and ideologically, must fall and with it the favorable summary judgment. The State Bar has not demonstrated that there is no triable issue on whether it has engaged in political and ideological activities unrelated to its statutory purposes, or if germane, which do not impose additional infringements on the First Amendment rights of objecting members.

To the extent that plaintiffs establish in further proceedings that the State Bar has used compelled membership fees in excess of the statutory authority granted to it, or in violation of the principles of the First Amendment, they will be entitled, at the least, to declaratory relief. To the extent they establish that funds are spent in excess of statutory authority they will also be entitled to injunctive relief to prevent future expenditures. (Stanson v. Mott, supra, 17 Cal.3d at p. 223.) The First Amendment, however, does not require that the defendants be enjoined from future expenditures. The State Bar may expend funds for activities which are germane to its statutory purposes even though the expenditures, if funded by dues of dissenting members, would transgress First Amendment limitations. The constitution only requires that these transgressing expenditures not be financed with the compulsory dues of those who object. (*Abood, supra*, 431 U.S. at pp. 235-246 [52 L.Ed.2d at pp. 284-285].)

The remedy for such a situation, if the State Bar desires to engage in those activities, is to provide a scheme whereby the dissenting members are not required to finance the political or ideological activities of the State Bar. (Chicago Teachers Union v. Hudson, supra, 89 L.Ed.2d 232; *Ellis, supra*, 80 L.Ed.2d at p. 439; *Abood*, supra, 431 U.S. at p. 237, fn. 35.)

IV

We finally consider the propriety of the summary judgment in favor of the individual defendants. Plaintiffs sought to hold the members of the Board of Governors liable for amounts expended for improper purposes after September 12, 1982. The trial court found that plaintiffs failed to show that the board members did not use due care, and that the supporting papers showed that they acted in good faith. Summary judgment was therefore granted in favor of the individual defendants.

We first hold that the individual defendants may not be held responsible for expenditures which are authorized by statute but which impermissibly impinge upon plaintiff's First Amendment rights under *Abood* and *Ellis*. This is so because, as we have noted, the Constitution does not forbid such expenditures; it only requires that they not be financed with the compulsory dues of the dissenters. Accordingly, the individual defendants cannot be required to reimburse the bar for such expenditures, although the bar may be required to provided a remedy to the plaintiffs.

The individual defendants may be held, upon a proper showing, to reimburse the State Bar for expenditure of funds which are in excess of the bar's statutory powers.[17] In moving for summary judgment the individual defendants asserted, in their points and authorities,

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[17] Perhaps due to the unique nature of the State Bar and this litigation, the parties have assumed that the standard set forth in Stanson v. Mott, supra, 17 Cal.3d at page 223, is controlling. There the Supreme Court held that a public official who authorizes the improper expenditure of public funds is personally liable for the repayment of those funds if he failed to exercise due care in permitting the expenditure, regardless whether he acted in good faith. In determining whether the official acted with due care all of the circumstances must be considered, including whether the expenditure's impropriety was obvious, whether the official was alerted to the possible invalidity of the expenditure, and whether the official relied upon legal advice or the presumed validity of a legislative enactment or a judicial decision. (17 Cal.3d at p. 227.) Defendants have maintained that this is simply a case of the government adding its voice to those it must tolerate, and if that claim were accepted it would follow that the individual defendants are public officials within the meaning of Stanson v. Mott. However, we have rejected the claim that the bar speaks for the government. Although the members of the board of governors have been held to be public officials in performing their mandatory function of regulating the practice of law (Chronicle Pub. Co. v. Superior Court, supra, 54 Cal.2d at p. 566; Werner v. Hearst Publications, Inc. (1944) 65 Cal.App.2d 667, 671), it is not clear that they are public officials with respect to the bar's discretionary administration of justice function. This raises a question of the appropriate standard to apply in determining whether the individual defendants may be held liable for repayment of unauthorized expenditures. (Compare Corp. Code, § 309 [under general corporation law a director is not liable if he acts in good faith and with such care, including

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that they had acted in good faith and that the plaintiffs had not shown that they had not. This was an insufficient showing to support summary judgment in favor of the individual defendants. The fact that the defendants may have authorized unlawful expenditures raises an issue as to their good faith and exercise of due care in doing so. In order to support summary judgment the defendants were required to present affidavits, declarations, and other supporting papers which would show that there is no triable issue of fact and that they were entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (b), (c).) The defendants bore the burden of furnishing supporting documents that established that all the claims of the plaintiffs were entirely without merit on any legal theory. (Lipson v. Superior Court, supra, 31 Cal.3d 362, 374.) Mere conclusory allegations are insufficient. (de Echeguren v. de Echeguren (1962) 209 Cal.App.2d 141, 146.) And this is particularly so where the conclusory allegations are contained in points and authorities and are unsupported by affidavits, declarations, or other appropriate supporting papers. Defendants failed to establish by competent evidence that they

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reasonable inquiry, as an ordinarily prudent person would use in similar circumstances]; Malone v. Superior Court (1953) 40 Cal.2d 546, 551 [officer of an unincorporated association or a nonprofit corporation is to be treated the same as a public officer for purposes of an accounting upon improper handling of the association funds].) In this appeal the parties have not briefed or argued the issue of the standard to be applied in determining the liability of the individual defendants and we therefore do not reach that issue.

acted in good faith as a matter of law, and consequently they were not entitled to summary judgment in their favor.

The judgment is reversed and the cause is remanded for further proceedings in accordance with the views expressed in this opinion. (*CERTIFIED FOR PUBLICATION.*)

SPARKS, J.

I concur:

CARR, J.

I concur in the judgment and in much of the opinion of the court. I write separately to emphasize the State Bar's heavy burden on remand of proving a constitutionally permissible justification for using compelled membership dues to support political or ideological causes, even though such activities may be related in some way to the Bar's statutorily conferred powers. The forced subsidization of political or ideological causes inevitably involves additional First Amendment intrusions on the rights of objecting attorneys beyond those already countenanced by compelled membership in an integrated bar. Determination of constitutional adequacy of the governmental interest required to justify the additional intrusion (see Ellis v. Railway Clerks (1984) 466 U.S. 435 [80 L.Ed.2d 428, 447]) necessarily implicates the means employed to serve that interest. As stated in Roberts v. United States Jaycees (1984) ___ U.S. ___ [82 L.Ed.2d 462, 475] and reiterated in Chicago Teachers Union v. Hudson (1986) ___ U.S. ___ [89 L.Ed.2d 232, 245,

fn. 11], infringements on the right to associate for expressive purposes "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, *that cannot be achieved through means significantly less restrictive of associational freedoms.*" (Emphasis added.) Thus even when pursuing a legitimate governmental interest, the means chosen must be " 'least restrictive of freedom of belief and association' " (*Chicago Teachers Union*, supra, ___ U.S. at p. ___ [89 L.Ed.2d at p. 245, fn. 11], quoting Elrod v. Burns (1976) 427 U.S. 347, 363 [49 L.Ed.2d 547, 559]).

As does the court, I conclude that the record establishes beyond dispute that the use of compelled membership dues specifically to publicize the speeches and views of the State Bar President in 1982 and generally to engage in election campaigning in the guise of a program of public education is clearly a violation of the constitutional rights of objecting members. Furthermore, I agree that performance of the strictly regulatory functions of the bar does not violate the constitutional rights of any member. Beyond that, however, because of the inadequacy of the evidentiary record on appeal, I believe it is premature to speculate on the kinds of activities financed by compulsory bar dues which do not impermissibly infringe upon the First Amendment rights of objecting members.

PUGLIA, P.J.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF SACRAMENTO

DATE MAR. 19, 1984, COURT MET AT ___
DEPARTMENT 9

PRESENT HON, HORACE E. CECCHETTINI, JUDGE
T.K. RIVERA DEPUTY CLERK

___, REPORTER ___ BAILIFF

EDDIE KELLER, et al.	COUNSEL:
	ANTHONY T. CASO
vs	
STATE BAR OF CALIFORNIA, et al.	HERBERT M. ROSENTHAL ROBERT S. THOMPSON
	(Underline counsel present)

NATURE OF PROCEEDINGS: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES, OR FOR JUDGMENT ON THE PLEADINGS

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

COURT'S RULINGS

On October 25, 1982, four Plaintiffs filed the complaint herein against the State Bar of California and its Board of Governors seeking injunctive relief, mandate, declaratory relief and partial recovery of monies paid by way of dues. On November 18, 1982, and January 14, 1983, amendments adding additional plaintiffs were filed. The original answer was filed on January 21, 1983, and an amended answer on March 29, 1983, each admitting some

factual allegations but denying Plaintiffs' claims. A demurrer to the third affirmative defense was sustained without leave to amend. The motion for a preliminary injunction was denied on March 4, 1983.

On November 22, 1983, Defendants moved for summary judgment with alternative requests for summary adjudication and judgment on the pleadings. Plaintiffs filed a motion for "Partial Summary Judgment" on November 23, 1983.

While urging different theories, the complaint herein essentially alleges that Plaintiffs are required to be members of the defendant State Bar Association, which is administered by the individual Defendants; that the State Bar collects dues from them, but uses part of the monies for political and ideological causes in violation of Plaintiffs' First Amendment rights; that Plaintiffs disagree with the espoused causes; and that the individual Defendants are allegedly liable for return of certain monies used to promulgate the same.

The State Bar is a governmental agency authorized to do the acts which Plaintiffs find objectionable. Express constitutional or statutory sanction does not exist for each of said activities, but by necessary implication that result must be reached. The First Amendment is no bar to these activities, and it is clear that the State Bar acts strictly within the laws and rules which safeguard the participatorial rights of all members. Moreover, Plaintiffs failed to show that the Board member Defendants did not use "due care" within the standards set forth in *Stanson v. Mott*; 17 Cal.3d 206. The evidence is that they acted in good faith. Under these circumstances, there is no triable

issue, and the motion for summary judgment by all defendants is granted. The motion by Plaintiffs is denied. The Court overrules the evidentiary and other objections by Plaintiffs.

cc-mailed to each above named counsel this date

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JOYCE RUSSELL SMITH, CLERK

CC 1b
ACTION NO. 307168

By /s/ T.K. Rivera Deputy